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VOLUME 415

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1973

FEBRUARY 4 THROUGH MARCH 26, 1974

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATUM

411 U. S. 178 n. 19, last line: "States" should be "United States."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

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ROBERT H. BORK, Solicitor General.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1973

RENEGOTIATION BOARD *v.* BANNERCRAFT CLOTHING CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72–822. Argued October 17, 1973—Decided February 19, 1974

Respondents, whose profits on defense contracts are undergoing renegotiation pursuant to the Renegotiation Act of 1951, sued in the District Court under the Freedom of Information Act (FOIA) to enjoin petitioner Board from withholding documents that respondents had requested and from conducting any further renegotiation proceedings until the documents were produced. The District Court in each case granted injunctive relief. The cases were consolidated on appeal and the Court of Appeals affirmed, holding that the District Court had jurisdiction under the FOIA to enjoin administrative proceedings before petitioner and to order production of the documents. Though noting that the FOIA nowhere authorizes injunctions of agency proceedings, the court concluded that Congress intended to confer broad equitable jurisdiction upon the district courts and that "temporary stays of pending administrative procedures may be necessary on occasion to enforce [FOIA] policy." The court also concluded that contractors had to exhaust their administrative remedies only under the FOIA but not under the Renegotiation Act before they were able to request injunctive relief against renegotiation proceedings and that contractors' remedies before petitioner

and *de novo* proceedings in the Court of Claims as provided under the Renegotiation Act were inadequate to prevent irreparable harm. Petitioner contends that the FOIA's provision in 5 U. S. C. § 552 (a) (3) for enjoining an agency from withholding its records and ordering the production of records improperly withheld from a complainant is the sole method of judicial enforcement. *Held:*

1. The FOIA does not limit the inherent powers of an equity court to grant relief, as is manifest from the broad statutory language that Congress used, with its emphasis on disclosure, its carefully delineated exemptions, and the fact that § 552 (a) vests equitable jurisdiction in the district courts. Pp. 16–20.

2. In a *renegotiation* case a contractor must pursue its administrative remedy under the Renegotiation Act and cannot through resort to preliminary litigation over an FOIA claim obtain judicial interference with the procedures set forth in the Renegotiation Act. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752; *Lichter* v. *United States*, 334 U. S. 742; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. Pp. 20–25.

(a) It would contravene the Act's legislative purpose if judicial review by way of injunctive relief under FOIA were allowed to interrupt the process of bargaining that inheres in the statutory renegotiation scheme and would delay the Government's recovery of excessive profits. Pp. 20–23.

(b) The contractor through a *de novo* proceeding in the Court of Claims, where discovery procedures are available, is not limited in exercising its normal litigation rights. Pp. 23–24.

151 U. S. App. D. C. 174, 466 F. 2d 345, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which STEWART, MARSHALL, and POWELL, JJ., joined, *post*, p. 26.

Harriet S. Shapiro argued the cause for petitioner. With her on the brief were *Solicitor General Griswold, Assistant Attorney General Wood, Walter H. Fleischer,* and *William D. Appler.*

Robert L. Ackerly argued the cause for respondents Bannercraft Clothing Co., Inc., et al. With him on the brief were *James J. Gallagher, Charles A. O'Connor III,* and *David V. Anthony.* *Burton A. Schwalb* argued the

cause for respondent David B. Lilly Co., Inc. With him on the brief were *Michael Evan Jaffe* and *Marian B. Horn.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Three cases, consolidated for hearing in the court below, raise the issue of the effect of the Freedom of Information Act (FOIA), 5 U. S. C. § 552, upon proceedings pending under the Renegotiation Act of 1951, c. 15, 65 Stat. 7, as amended, 50 U. S. C. App. § 1211 *et seq.* In particular, they concern the jurisdiction of a federal district court to enjoin the renegotiation process until an FOIA claim is resolved.

I

The three respondents, Bannercraft Clothing Company, Inc., Astro Communication Laboratory, a division of Aiken Industries, Inc., and David B. Lilly Co., Inc., successor to Delaware Fastener Corporation, all possessed national defense contracts with a "Department" of the United States, as defined in § 103 (a) of the Renegotiation Act, 50 U. S. C. App. § 1213 (a). These agreements, therefore, under § 102 of that Act, 50 U. S. C. App. § 1212, were subject to renegotiation.

A. *Bannercraft.* In 1966 and 1967, this respondent manufactured uniforms at a plant in Philadelphia. Its fiscal year was the calendar year. Because most of its production was subject to renegotiation, the company, for each of the two years, timely filed with the Renegotiation Board the financial statement required under § 105 (e)(1) of the Act, 50 U. S. C. App. § 1215 (e)(1). Rep-

*Briefs of *amici curiae* urging affirmance were filed by *Gerald C. Smetana, Lawrence M. Cohen,* and *Alan Raywid* for Sears, Roebuck & Co., and by *Milton A. Smith, Mr. Smetana, Jerry Kronenberg,* and *Mr. Raywid* for the Chamber of Commerce of the United States.

resentatives of the Eastern Regional Renegotiation Board then reviewed Bannercraft's operations and conferred with its president. On February 20, 1970, the Regional Board, by letter, advised the contractor that it was recommending that Bannercraft in 1967 had realized excessive profits in the amount of $1,400,000, subject to the usual adjustment for state taxes measured by income and for any tax credit to which the contractor was entitled under § 1481 of the Internal Revenue Code of 1954, 26 U. S. C. § 1481.[1]

Bannercraft promptly requested that it be furnished, pursuant to 32 CFR § 1477.3 (1970),[2] with a "written summary of the facts and reasons" upon which the determination was based. It asserted, however, that "it is not possible to state [as the Regulation's proviso required] whether all relevant evidence has been submitted since we have never had in writing the basis upon which you made this determination." The Regional Board replied that because "the statement required by the regulation" was not submitted, "your request for a summary is defective."

Bannercraft's response was that it had "submitted all of the evidence which it believes to be relevant to the

[1] Shortly prior thereto, the Regional Board advised the contractor that it had determined its excessive profits for 1966 to be $75,000.

[2] "§ 1477.3 Furnishing of other statements.

"When a Regional Board has made . . . a final recommendation in a Class A case . . . and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board . . . will furnish the contractor a written summary of the facts and reasons upon which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement: *Provided*, That the contractor requests such a statement within a reasonable time after it has been advised of such final determination or recommendation, and states that it has submitted all the evidence which it believes to be relevant to the renegotiation proceedings."

renegotiation proceedings," but that this was "without prejudice to an opportunity to offer evidence on the issues disclosed by the [Regional Board's] Summary of Facts and Reasons" and that the required statement was "somewhat meaningless when we do not have a written statement of the issue upon which you have made your finding."

On March 16, Bannercraft, pursuant to the FOIA, made a written request of the Renegotiation Board that six categories of documents be produced.[3] No response to this request was forthcoming.

In late April, the Board, by letters, notified Bannercraft of its determinations that the contractor had realized excessive profits in the amount of $75,000 for 1966 (the same figure determined by the Regional Board) and

[3] The request was based on the decision, only six days earlier, in *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U. S. App. D. C. 147, 425 F. 2d 578 (1970), that the Renegotiation Board was subject to the FOIA and that certain Board orders and opinions were accessible to the contractor after deletions made in the light of the Act's exemption provisions. See the same case on remand, 325 F. Supp. 1146, aff'd, 157 U. S. App. D. C. 121, 482 F. 2d 710 (1973).

The documents Bannercraft requested were: (1) communications between the Board and other Government agencies with respect to Bannercraft's renegotiable contracts for 1966 and 1967; (2) investigatory or other reports prepared by Board employees "containing facts which are relevant to the Board's determination as to Bannercraft's renegotiable contracts" for the two years; (3) final opinions, and the like, and summaries on which determinations were based for the years 1962 through 1968 for 11 named companies engaged in similar manufacture; (4) facts upon which the Board concluded that Bannercraft's pricing policy in 1966 was unreasonable; (5) identification of those manufacturers with which Bannercraft's production cost was compared, as stated in the summary for 1966, with cross-reference to comparable data as to each of the 11 named manufacturers; and (6) the "procurement information," described in the summary for 1966, that the Board contended indicated that there was a lack of effective price competition.

$1,450,000 for 1967 (an increase of $50,000 over the Regional Board's determination).

Bannercraft then went to court. On May 1, it filed a complaint against the Board in the United States District Court for the District of Columbia, praying that the Board be enjoined from withholding the documents requested and from conducting any further renegotiation proceedings with Bannercraft for 1966 and 1967 until the documents were produced. The Board opposed the application for temporary relief and moved to dismiss. Judge Smith issued a temporary restraining order and, thereafter, a preliminary injunction, each without opinion, and stayed further Board proceedings.

In May, the Board issued a Statement of Facts and Reasons for Bannercraft's years 1966 and 1967. Bannercraft then made a further request for documents related to the factual basis for the Board's conclusions reflected in the Statement. In July, the Board responded. It produced some documents and, with respect to others, claimed exemption under 5 U. S. C. § 552 (b) [4] or asserted that the information sought was not covered by the Act.[5]

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[4] "§ 552.

. . . . . .

"(b) This section does not apply to matters that are—

. . . . . .

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

. . . . . .

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency . . . ."

[5] The Board took the position (a) that the Board-agency communications, the investigatory and other reports, and the "procure-

On August 4, the Board moved to dissolve the preliminary injunction. It took the position that its response to Bannercraft's requests fulfilled its obligations under the FOIA. The District Court denied the motion. The Board then appealed.

B. *Astro.* This respondent's factual case is essentially the same as Bannercraft's. The year at issue is the fiscal year ended September 30, 1967. Astro, pursuant to the FOIA, requested production by the Board of five categories of material.[6] At a conference held on May 12, 1970, Astro was advised that the Board had made a tentative determination of excessive profits for the year in the amount of $225,000. In July, the Board denied Astro's FOIA request.

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ment information" (to the extent it consisted of written records), being the first, second, and sixth items specified in the request of March 16, were exempt under 5 U. S. C. §§ 552 (b) (3), (4), (5), and (7); (b) that the facts relied upon by the Board in concluding that Bannercraft's pricing policy was unreasonable, that is, the fourth item in the request of March 16, and the identification of manufacturers, the fifth item, were not requests "for records"; and (c) that copies of clearance notices, orders, and renegotiation agreements issued with respect to the 11 companies named in the third item of the March 16 request, and with respect to manufacturers with whom Bannercraft's production cost was compared, as called for by the fifth item, all with identifying details deleted, were supplied therewith. Beyond this, documents requested by Bannercraft were refused.

[6] These were all documents that constituted the Astro renegotiation report for the year; all documents in the file that analyzed "or in any way [bore] upon" Astro's treatment of selling expenses; all file documents that had to do with "Information received," as referred to in a stated communication from the Regional Board to Astro; all file documents that related to the reasons for the Board's order denying Astro's request to file an untimely application for commercial exemption; and all records that had to do with Astro's renegotiation for the year "to the extent that such documents have been generated by and are in the custody of either" the Regional Board or the Board itself.

On August 12, Astro filed its complaint against the Board in the United States District Court for the District of Columbia. It prayed for relief similar to that sought by Bannercraft. Judge Pratt enjoined the Board from continuing renegotiation proceedings with Astro. The court also ordered the Board to allow Astro, within 30 days, to inspect and obtain copies of all documents requested by Astro that the Board had no objection to turning over, and to submit to the court, *in camera,* all documents the Board objected to producing, with a statement of reasons for each objection. The Board appealed.

C. *Lilly.* This respondent's case is similar to the other two. In June 1970, Lilly and its predecessor in interest, Delaware Fastener Corporation, were advised by their renegotiator that he had made determinations of excessive profits for 1967 for Lilly in the amount of $200,000 and for Fastener in the amount of $500,000.[7] On June 29, the two corporations asked the Board to furnish certain categories of information.[8]

No response was immediately forthcoming from the Board. On July 9, Lilly filed its complaint against the Board in the United States District Court for the Dis-

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[7] Delaware Fastener Corp. was merged into David B. Lilly Co., Inc., in 1970 after renegotiation proceedings as to each corporation had begun, but before Lilly's suit was instituted.

[8] The corporations requested all communications between the Board and other governmental agencies concerning either corporation; all sections of the Report of Renegotiation prepared by the Regional Board; all analyses used in comparing either of the corporations "with other contractors or subcontractors and reflecting the facts relating to such comparisons"; all written communications between the Board and firms holding renegotiable contracts or subcontracts in any way concerning either of the corporations and their performance; and all intra-agency memoranda and written communications consisting of recommendations or analyses prepared by the Board in connection with the renegotiation proceedings.

trict of Columbia, praying for an order compelling the Board to produce the documents demanded and restraining the Board from acting and, in particular, from requiring the contractors to elect a procedure until the documents had been produced and the contractors had been given a reasonable time to study them. Thereafter, the Board denied the request for information.

On July 31, Judge Jones issued an order temporarily restraining the Board from continuing renegotiation with Lilly and Delaware. Subsequently, the Board moved to dismiss the complaint or, in the alternative, for summary judgment. On September 1, a preliminary injunction was issued. The Board appealed.

The three appeals were consolidated and heard together in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals, one judge dissenting, affirmed all three decisions. 151 U. S. App. D. C. 174, 466 F. 2d 345 (1972). It held that the District Court possessed jurisdiction under the FOIA to enjoin administrative proceedings before the Board and to order the production of appropriate documents. It concluded that, "although it is undeniably true that Congress was principally interested in opening administrative processes to the scrutiny of the press and general public" when it enacted the FOIA, "Congress was also troubled by the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information." *Id.*, at 181, 466 F. 2d, at 352. The court then described this latter congressional concern as a "subsidiary statutory purpose," citing excerpts from S. Rep. No. 813, 89th Cong., 1st Sess., 7 (1965), and from H. R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966), and also citing 5 U. S. C. § 552 (a)(2). See *infra*, at 12 n. 9. It reasoned that, despite "the fact that the Act nowhere in terms authorizes . . . injunctions" against agency proceedings, in enacting the statute Congress intended to confer broad

equitable jurisdiction upon the district courts, and that "temporary stays of pending administrative procedures may be necessary on occasion to enforce the policy" of the FOIA. 151 U. S. App. D. C., at 181–183, 466 F. 2d, at 352–354.

The court then turned to the exhaustion-of-administrative-remedies question. It observed that there is no general rule that it is always improper for a court to interfere with pending administrative proceedings, citing *McKart* v. *United States*, 395 U. S. 185, 193 (1969). It concluded that "when the purposes of the doctrine are individually measured against the facts of these cases, it is plain that no legitimate judicial policy would be served by depriving these appellees of the relief they seek." 151 U. S. App. D. C., at 184, 466 F. 2d, at 355. In effect, the court reasoned that contractors need exhaust only their administrative remedies under the FOIA, and not their administrative remedies under the Renegotiation Act, as a condition precedent to requesting injunctive relief against renegotiation proceedings. The court found the contractors' remedies before the Board and *de novo* proceedings in the Court of Claims inadequate to prevent irreparable harm.

The dissenting judge began with the accepted proposition that federal courts have only limited jurisdiction and stated that the majority's observation, to the effect that the "existence of present need for judicial intervention does have a bearing on both jurisdiction and exhaustion," is "an error bordering on constitutional dimensions," for the appellees' need "is wholly irrelevant to determination of the jurisdiction of the District Courts in these cases." *Id.*, at 191, 466 F. 2d, at 362.

The dissent then turned to the principle that where a statute creates a right and provides a special remedy, that remedy is exclusive. Thus, in the FOIA, Congress

gave the general public an express right of access to all Federal Government information not within the exempted categories. This right was enforceable by "the specific, narrow, remedies of an injunction against withholding agency records and an affirmative order to produce such records improperly withheld." *Ibid.* The dissent concluded that no jurisdiction to grant any other remedy was conferred by Congress and that the District Court, therefore, was without jurisdiction to enjoin the proceedings before the Renegotiation Board. Nothing in the congressional reports cited by the majority justified its contrary conclusion. The dissent further concluded that there was no suggestion that Congress had any concern with litigants before the administrative agencies, and that what they were concerned with was to make information available "to any member of the public without requiring any showing of need therefor." *Id.*, at 192, 466 F. 2d, at 363.

The dissent also was at odds with the majority's disposition of the exhaustion issue. It asserted that the majority seriously misconstrued the intended functioning of the Renegotiation Board's procedures, namely, that controlled access to information concerning the Government's position plays a significant role in the administrative process; that interruption of the administrative proceedings totally destroys the balance of negotiating strength; and that the attempt to enjoin the ongoing negotiations was really not a request for relief under the FOIA but was a challenge to the Board's procedures themselves. *Id.*, at 194–195, 466 F. 2d, at 365–366.

We granted certiorari, 410 U. S. 907 (1973), because of the importance of the issue of the impact of the FOIA upon long-established procedures of the Renegotiation Board.

II

Before considering the issue of the District Court's jurisdiction to enjoin a proceeding pending in the Renegotiation Board, it is helpful to review the provisions of the FOIA and of the Renegotiation Act of 1951:

A. *The FOIA.* This statute, 5 U. S. C. § 552, was enacted in 1966, 80 Stat. 383, as a revision of § 3 of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.). S. Rep. No. 813, 89th Cong., 1st Sess., 3–4 (1965); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 1–6 (1966). It was amended by Pub. L. 90–23, adopted June 5, 1967, 81 Stat. 54.

Section 552 (a) states, "Each agency shall make available to the public" certain information of enumerated categories. This covers virtually all information not specifically exempted by § 552 (b). Section 552 (a)(2) [9] provides the sanction that a "final order, opinion, statement of policy, interpretation, or staff manual or instruc-

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[9] "§ 552. Public Information; agency rules, opinions, orders, records, and proceedings.

"(a) Each agency shall make available to the public information as follows:

. . . . . .

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions . . .

"(B) . . . statements of policy and interpretations . . . and

"(C) administrative staff manuals and instructions to staff that affect a member of the public;

". . . A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

"(i) it has been indexed and either made available or published as provided by this paragraph; or

"(ii) the party has actual and timely notice of the terms thereof."

tion" may not be relied upon as precedent by the agency against a party unless "it has been indexed and either made available or published," or unless a party has "actual and timely notice of the terms thereof." Section 552 (a)(3) specifically vests the District Court with jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." It places the burden on the agency to sustain its action; it empowers the District Court to punish the responsible employee for contempt in the event of noncompliance; and it provides that the FOIA suit generally is to take precedence on the court's docket and is to be expedited on the calendar.[10]

B. *The Renegotiation Act of 1951.*[11] This statute, 50 U. S. C. App. §§ 1211–1233, enacted shortly after the close of World War II and at the height of the Korean conflict, recites that Congress had made available "extensive funds" for the execution of the national defense program and that "sound execution" of the program requires "the elimination of excessive profits from contracts made with the United States, and from related subcontracts." § 101, 50 U. S. C. App. § 1211. The Renegotiation

[10] In pertinent part, § 552 (a)(3) provides:

"On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee . . . . Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way."

[11] Predecessor renegotiation statutes are cited and described in *Lichter* v. *United States,* 334 U. S. 742, 745 n. 1 (1948).

Board is established as an independent agency in the Executive Branch to accomplish this objective. § 107, 50 U. S. C. App. § 1217 (a). The Board's functions are excluded from the operation of the Administrative Procedure Act (5 U. S. C. § 551 *et seq.*, and § 701 *et seq.*) except the public information section thereof (5 U. S. C. § 552). § 111, 50 U. S. C. App. § 1221.

The Board operates primarily by informal negotiation with the contractor and not by formal hearing. It is directed to "endeavor to make an agreement with the contractor . . . with respect to the elimination of excessive profits." § 105 (a), 50 U. S. C. App. § 1215 (a). The contractor subject to the Act must file, for its fiscal year, a detailed financial statement. § 105 (e)(1), 50 U. S. C. App. § 1215 (e)(1). On the basis of this statement an initial determination of excessive profits is made. From the date of filing of the statement, the Board has one year to commence proceedings [12] and, with stated exceptions, the renegotiation is to be completed within two years following its commencement or "all liabilities of the contractor . . . for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged." [13] § 105 (c), 50 U. S. C. App. § 1215 (c).

If the Board and the contractor do not agree, the Board by order determines the excessive profits. § 105 (a), 50 U. S. C. App. § 1215 (a). At the request of the contractor, the Board shall furnish it "with a statement of such determination, of the facts used as a basis

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[12] Section 105 (c), 50 U. S. C. App. § 1215 (c), provides that, in the absence of fraud, malfeasance, or willful misrepresentation, all liabilities of the contractor for excessive profits shall be discharged if the "proceeding is not commenced prior to the expiration of one year following the date upon which such statement is so filed."

[13] The respondents in the present litigation have agreed to suspend their limitation periods pending resolution of the FOIA claims. See 151 U. S. App. D. C. 174, 190 n. 12, 466 F. 2d 345, 361 n. 12 (1972).

therefor, and of its reasons for such determination." *Ibid.* The contractor then may initiate a *de novo* proceeding in the Court of Claims,[14] which has exclusive jurisdiction to determine the contractor's excessive profits. § 108, 50 U. S. C. App. § 1218 (1970 ed., Supp. II). The action "shall not be treated as a proceeding to review the determination of the Board," *ibid.*, and the Board's statement "shall not be used in the Court of Claims as proof of the facts or conclusions stated therein," § 105 (a), 50 U. S. C. App. § 1215 (a) (1970 ed., Supp. II).

The renegotiation process itself is initiated by notice to the contractor and by assignment of the contractor's report to the appropriate Regional Board. 32 CFR § 1472.2 (1972).[15] Personnel of the Regional Board then prepare a "Report of Renegotiation" which includes a "recommendation with respect to the amount, if any, of excessive profits for the fiscal year under review." 32 CFR § 1472.3 (d). This is only the first of several steps within the agency structure. Thereafter the statement is reviewed, successively, by a panel of the Regional Board, by the Regional Board itself, and finally by the Renegotiation Board. At each level there is consultation with the contractor, the preparation of a report and analysis, and submission to the next higher level of a recommendation as to excessive profits. 32 CFR §§ 1472.3 (d) and (f)–(i), and §§ 1472.4 (b)–(d). At each stage, the contractor is entitled to a statement of the basis for the recommendation. Each level is free to make new findings and no level is bound by the deter-

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[14] Until July 1971 the proceeding was to be initiated in the Tax Court. 65 Stat. 21.

[15] The CFR citations throughout this section of this opinion are to the 1972 version of Renegotiation Board procedures in effect at the time of the Court of Appeals' decision. The regulations were amended substantially in the fall of 1972. See 32 CFR pts. 1400–1599 (1973).

mination of the level below; the recommended settlement may decrease or increase at each level. *Ibid.*

III

It is clear, we think, that the Renegotiation Board, as an entity, is not exempt from applicable provisions of the FOIA. The Board, of course, is an "independent establishment" in the Executive Branch. § 107 (a) of the Renegotiation Act, 50 U. S. C. App. § 1217 (a). But "agency" is broadly defined to mean "each authority of the Government of the United States," except the Congress, the courts, territorial governments, the government of the District of Columbia, and, with respect to 5 U. S. C. § 552, certain other specifically described entities and functions. 5 U. S. C. § 551 (1). The Renegotiation Board is not among those excepted. Further, the House Committee's discussion of the requirement of § 552 (a)(2), that an agency's concurring and dissenting opinions, as well as final opinions, be made available, discloses that a reason for this provision was that "a recent survey indicated that five agencies—including . . . the Renegotiation Board—do not make public the minority views of their members." H. R. Rep. No. 1497, *supra,* at 8. Thus, despite its unique operational methods, the Board falls within the definition of "agency" in § 551 (1).[16]

So to conclude, however, does not provide automatically the answer to the question whether the FOIA authorizes a district court to enjoin Renegotiation Board

[16] The Court of Appeals in the present litigation and other federal decisions have recognized the general applicability of the FOIA to the Renegotiation Board. See *Fisher* v. *Renegotiation Board,* 153 U. S. App. D. C. 398, 473 F. 2d 109 (1972); *Lykes Bros. S. S. Co.* v. *United States,* 198 Ct. Cl. 312, 327, 459 F. 2d 1393, 1401 (1972); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 138 U. S. App. D. C. 147, 425 F. 2d 578 (1970).

proceedings until the court determines that the contractor is or is not entitled to information it claims under the FOIA.

As to this question, the respondent contractors assert that, although the FOIA does not grant this injunctive power in express terms, the power is to be implied from the court's inherent capacity to provide appropriate equitable relief. The Board, on the other hand, emphasizes that Congress in the Act expressly authorized the court to compel the production of agency records improperly withheld, placed the burden on the agency to sustain its action, and directed precedence on the docket for suits under the Act "over all other causes" and expedition of those suits "in every way." 5 U. S. C. § 552 (a)(3). The Board then contends that these provisions constitute the *exclusive* method for enforcing the disclosure requirements of the Act and that any implication of other injunctive power, at the behest of a litigant before the agency, would be inconsistent with the statutory language.

Clearly, as the Court of Appeals held, 151 U. S. App. D. C., at 181, 466 F. 2d, at 352, the Congress "was principally interested in opening administrative processes to the scrutiny of the press and general public when it passed the Information Act." The Second Circuit has described the Act's "ultimate purpose" as one "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities" (footnote omitted). *Frankel* v. *SEC*, 460 F. 2d 813, 816, cert. denied, 409 U. S. 889 (1972). The Senate Report, too, expressed concern for "an informed electorate." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).[17]

[17] Among other decisions emphasizing this general public purpose

The FOIA, 5 U. S. C. § 552 (a)(3), explicitly confers jurisdiction [18] to grant injunctive relief of a described type, namely, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." In addition, it provides a specific remedy for noncompliance.

This primary purpose of the FOIA, and this express grant of jurisdiction to enjoin in a specific way, coupled with a limited sanction, might suggest that the Act's provision for compelled production was intended to be the exclusive enforcement method. It has been held that "where a statute creates a right and provides a special remedy, that remedy is exclusive." *United States* v. *Babcock*, 250 U. S. 328, 331 (1919). And "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end." *Switchmen's Union* v. *NMB*,

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of the Act are *Ethyl Corp.* v. *EPA*, 478 F. 2d 47, 48 (CA4 1973); *Sterling Drug, Inc.* v. *FTC*, 146 U. S. App. D. C. 237, 242, 450 F. 2d 698, 703 (1971); *Soucie* v. *David*, 145 U. S. App. D. C. 144, 153, 448 F. 2d 1067, 1076 (1971); *LaMorte* v. *Mansfield*, 438 F. 2d 448, 451 (CA2 1971); *Bristol-Myers Co.* v. *FTC*, 138 U. S. App. D. C. 22, 25, 424 F. 2d 935, 938, cert. denied, 400 U. S. 824 (1970).

[18] S. 1666, 88th Cong., 2d Sess., was passed by the Senate on July 28, 1964, 110 Cong. Rec. 17086–17089, and reconsidered and passed again on July 31, 1964, 110 Cong Rec. 17666–17668. There was insufficient time, however, for full consideration by the House. S. 1160, 89th Cong., 1st Sess., then became the FOIA and "is substantially S. 1666." S. Rep. No. 813, 89th Cong., 1st Sess., 4 (1965). There was no change in the remedy provided.

The Senate report which accompanied S. 1666 explains, "The provision for enjoining an agency from further withholding is placed in the statute to make clear that the district courts shall have this power." S. Rep. No. 1219, 88th Cong., 2d Sess., 7 (1964). In discussing the contempt provision, the Report states, "This is another addition which has been made to avoid any possible misunderstanding as to the courts' powers." *Ibid.*

320 U. S. 297, 301 (1943). See *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U. S. 453, 458 (1974). One therefore may argue, as the Board has argued here, that this is not a situation where "Congress has utilized . . . the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest." *Porter* v. *Warner Holding Co.,* 328 U. S. 395, 403 (1946).

There is significant authority, however, that points to the opposite conclusion. *Porter* itself, although recognizing the kind of situation to which *Babcock* is applicable, 328 U. S., at 403, upheld broad equitable power in the District Court under a statute authorizing the court to grant injunctive and restraining relief "or other order," and did so, not only because of the presence of the "other order" language, but because of the "traditional equity powers of a court." *Id.,* at 400. Emphasis on broad equity power, even in the face of a silent statute, also appears in *Mitchell* v. *Robert DeMario Jewelry, Inc.,* 361 U. S. 288, 290–291 (1960); *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4 (1942); *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U. S. 658, 671 n. 22 (1963); see L. Jaffe, Judicial Control of Administrative Action 659 (1965), and is sometimes related to the All Writs Act, 28 U. S. C. § 1651 (a). *FTC* v. *Dean Foods Co.,* 384 U. S. 597, 603–604 (1966).

The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do, *Scripps-Howard, supra,* 316 U. S., at 17; and the fact that the Act, to a definite degree, makes the district courts the enforcement arm of the statute, 5 U. S. C. § 552 (a)(3), persuade us that the *Babcock* and

Switchmen's Union principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. With the express vesting of equitable jurisdiction in the district court by § 552 (a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

IV

We find it unnecessary, however, to decide in these cases, whether, or under what circumstances, it would be proper for the District Court to exercise jurisdiction to enjoin agency action pending the resolution of an asserted FOIA claim. We hold only that in a *renegotiation* case the contractor is obliged to pursue its administrative remedy and, when it fails to do so, may not attain its ends through the route of judicial interference. The nature of the renegotiation process mandates this result, and, were it otherwise, the effect would be that renegotiation, and its aims, would be supplanted and defeated by an FOIA suit.[19]

Before the adoption of the FOIA this Court consistently held that the design of the Renegotiation Act was to have renegotiation proceed expeditiously without interruption for judicial review, and that the Board's proceedings were not to be enjoined prior to the exhaustion of the administrative process. This was the result where the proceedings were challenged on constitutional grounds, *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (1947); *Lichter* v. *United States*, 334 U. S. 742, 789–793 (1948), on statutory grounds, *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540 (1946), and on procedural grounds, *Lichter*, 334 U. S., at 791. The

[19] See Note, 1973 U. Ill. L. F. 180, 191 (1973); Note, 51 Tex. L. Rev. 757, 765 (1973).

Court's emphasis was on the absence of any "lawful function" on the part of the courts "to anticipate the administrative decision with their own," *Aircraft,* 331 U. S., at 767; on the availability of a due process hearing in the post-administrative *de novo* proceeding in the Tax Court, *Macauley,* 327 U. S., at 543, where constitutional as well as nonconstitutional issues could be resolved, *Aircraft,* 331 U. S., at 769 n. 30, citing 89 Cong. Rec. 9930 (1943),[20] and at 771; and on the Act's provisions for expeditious settlement in informal negotiation free "from the tedious burden of litigation." *Id.,* at 770.

In *Aircraft* the Court rejected arguments substantially the same as those advanced by the respondents here, *id.,* at 758 n. 12 (inability to participate effectively because of lack of information upon which the Board had relied, see No. 95, O. T. 1946, Tr. of R., Vol. I, p. 141), and refused to permit renegotiation to be enjoined. "To countenance short-circuiting of the Tax Court proceedings here would be, under all the circumstances but more especially in view of Congress' policy and command with respect to those proceedings, a long overreaching of equity's strong arm." 331 U. S., at 781.

Reflection upon the nature of the Renegotiation Board's process fortifies these conclusions. The character and the entire atmosphere of the process is negotiation—that is, renegotiation—of an existing contract. And negotiation is a bargaining process, with give and

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[20] "The committee has provided that any contractor aggrieved by a determination of excessive profits under the old law, whether he was cooperative and signed a closing agreement or not, may have a review of that determination in the Tax Court of the United States and in the review have all issues, constitutional and otherwise, decided by the court." (Remarks of Cong. Disney.)

take, and with stress upon and use of the strengths of one's own position and the weaknesses of the position of the other party. It is in a process such as this where the phrase "leading from strength" has been so effectively transferred in practical application from the card table to the world of commerce. It is part of the warp and woof of production. It is pure bargaining—permitted by the statute with respect to contracts already made—the same kind of bargaining that produces the union-employer agreement or the transfer of substantial property from the willing seller to the interested buyer.

We see nothing in the adoption of the FOIA in 1966 that impinges upon the settled law of the *Aircraft-Lichter-Macauley* cases or that warrants an exception to the principle they espouse. Nothing new by way of due process emerged with the FOIA. Nothing therein indicates that Congress wished to change the Renegotiation Act's purposeful design of negotiation without interruption for judicial review. FOIA's stress was on disclosure, to be sure, but it was on disclosure for the public, *EPA* v. *Mink*, 410 U. S. 73, 80 (1973), and not for the negotiating self-interested contractor. *Id.*, at 86; see K. Davis, Administrative Law Treatise § 3A.4, p. 120, § 3A.29, p. 171 (Supp. 1970). And when Congress in 1971 reviewed the Renegotiation Act and substituted the Court of Claims for the Tax Court, no other significant change in the existing process was effected. See S. Rep. No. 92–245 (1971), accompanying H. R. 8311, which became the amending statute, Pub. L. 92–41, 85 Stat. 97.

It is no answer to say, as Bannercraft and Astro urge, that *Aircraft, Lichter,* and *Macauley* relate only to issues on the merits over which Congress had vested jurisdiction in the first instance in the Board and then in the Tax Court. We read those decisions otherwise.

Seeking injunctive relief during the pendency of renegotiation encourages delay through resort to preliminary litigation over an FOIA claim. The delay is not imaginary or without ultimate consequence. The present cases provide an example of this, for each has been pending now for more than three years. The Government is foreclosed from taking action to recover excessive profits until the Board's final order is entered; even then, interest does not begin to run until 30 days after the entry of that order. 50 U. S. C. App. §§ 1215 (b)(1) and (2). The contractor, by delay, has little to lose and much to gain.

There is no limitation or denial of the contractor's normal litigation rights when the renegotiation process is at end. The contractor may institute its *de novo* proceeding in the Court of Claims, unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence. There the usual rights of discovery are available.[21] And there the parties are not bound by a prior determination made at any level of the Renegotiation Board structure. 50 U. S. C. App. § 1218. That proceeding is the judicial remedy at law provided by the Renegotiation Act and is adequate protection against injury. Note, 41 Geo. Wash. L. Rev. 1072, 1084 (1973). We note that a contractor does not become obligated to remit excessive profits until termination of the Court of Claims suit, if it elects that course. The injury suffered, absent an injunction, is no more than the risk of being

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[21] The Court of Claims has been described, "by virtue of its role in the renegotiation process and its general expertise in the field of government contracts," as being "uniquely qualified to supervise discovery against the Renegotiation Board." Note, 41 Geo. Wash. L. Rev. 1072, 1084 (1973).

unsuccessful in the *de novo* bargaining process and the incurrence of the expense incident to renegotiation.[22] Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51–52 (1938); L. Jaffe, Judicial Control of Administrative Action 429 (1965). Without a clear showing of irreparable injury, see *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 111, 259 F. 2d 921, 926 (1958), failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process. *Myers, supra; Sears, Roebuck & Co.* v. *NLRB*, 153 U. S. App. D. C. 380, 382, 473 F. 2d 91, 93 (1972).

Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery, see *Sears, Roebuck & Co.* v. *NLRB*, 433 F. 2d 210, 211 (CA6 1970), over and beyond that provided by the regulations issued by the Renegotiation Board for its proceedings. See 32 CFR §§ 1480.1–1480.12 (1972).[23] Discovery for litigation purposes is not an expressly indicated purpose of the Act. Protection for the contractor in the renegotiation process is afforded through the injunctive power specifically bestowed by 5 U. S. C. § 552 (a)(3).

The Renegotiation Act and its predecessors obviously emerged from congressional awareness that, with the vastness of defense expenditure, overcharging and misappropriation of public funds by unscrupulous contractors and those fortuitously placed to perform needed work were almost inevitable. The target of the legis-

[22] In this litigation there is no allegation or evidence that the Board was negotiating in bad faith or acting *ultra vires*. We therefore are not now concerned with the situation where allegations or evidence of that kind is present.

[23] Since the institution of these suits, the Board has amended its regulations to expand the discovery available to contractors. See 32 CFR §§ 1470.3, 1472.3 to 1472.6, 1474.3 to 1474.5 (1973).

lation was excessive profit, not the fair and reasonable one. The latter was anticipated and accepted. The line between a reasonable profit and excessive profit is not always easily ascertained or brightly lit. But the ascertainment of excessive profits was a duty vested by the Congress in the Renegotiation Board in the first instance. The Board thus is the fulcrum of a process that enables the Government initially to consult a contractor, to make a contract with it, and then to have the contract subject to modification for excessive profits, whenever they materialize, without violation of the Due Process Clause of the Fifth Amendment. The disgorging of excessive profits is not by way of a tax, but the process is not unlike the imposition of a tax equivalent to the excessive profits. Congress' initial placing of the contractor-initiated final proceeding in the Tax Court is indicative of the relationship.

Of course, there is uncertainty in the renegotiation process. And, of course, that uncertainty is lessened or eliminated if the contractor, like the poker player, is able to ascertain all the cards in the Board's hand. There is risk, also, when the contractor accepts the determination of excessive profits made at any level of the renegotiation process. These risks, however, are the same risks that are inherent in the negotiation and voluntary settlement of any dispute. The one who pays possibly might pay less if he resorts to the factfinder instead of making the settlement. But he might pay more. That is the calculated risk he takes. It is the calculated risk provided for by Congress in the administrative process it prescribed in the Renegotiation Act. It is not a risk ungenerously laid upon the contractor, for it is counterbalanced by the profound interest of the public in the recapture of excessive profits that may flow to the contractor under its government contracts.

We stress, in conclusion, that the merits are not before us. They are yet to be decided by the District Court. Whether any demand made by these contractors is so vague as not to constitute a "request for identifiable records," 5 U. S. C. § 552 (a)(3), or is for material exempt from disclosure under 5 U. S. C. § 552 (b), are questions that remain open for decision on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL concur, dissenting.

The Court reverses the Court of Appeals, saying that respondent-contractors had not exhausted their administrative remedies. At issue is whether data in possession of the Renegotiation Board and relevant to the controversy between respondents and that Board should be disclosed to respondents. That raises a question under the Freedom of Information Act. It is, I submit, clear that respondents had exhausted every known way to obtain those data through administrative channels. Nothing remained to be done at that level. The District Court is the enforcement arm of the FOIA. Today's decision, however, says that court cannot act. Hence respondents are without remedy. The end result is to make the FOIA a dead letter in this area. Hence my dissent.

The nature of the so-called administrative law aspects of the problems under the Renegotiation Act is unique. The aim, of course, is the elimination of excessive profits of contractors and subcontractors in the national defense program, 50 U. S. C. App. § 1211. Detailed financial information must be filed with the Re-

negotiation Board, *id.*, § 1215 (e)(1). If on the basis of those data the Board decides to proceed, it refers the case to a Regional Renegotiation Board which determines tentatively the amount of excessive profits, 32 CFR § 1472.3 (e).[1] A conference with the contractor is then arranged. It may agree with the Regional Board's determination or contest it. If the latter, a second conference is held with a panel of the Regional Board which hears the arguments of the contractor and submits its recommendations to the Regional Board which may be for a greater or lesser amount than the original tentative determination, *id.*, §§ 1472.3 (f), (h), (i). Thereupon the Regional Board makes its recommendation, *id.*, § 1472.3 (i). If the contractor is still dissatisfied, it can appeal to the Renegotiation Board itself. In that event the case is assigned to a division of the Board which is not bound by or limited to any finding or determination of the Regional Board, *id.*, § 1472.4 (b). The division studies the case *de novo* and makes a recommendation to the Board which then makes a determination greater than, equal to, or less than any of the prior determinations, *id.*, § 1472.4 (d). Even then the renegotiation process continues, the Board seeking to obtain the contractor's voluntary agreement. Only if that effort fails is a final order determining the amount of excessive profits made, *ibid.*

That is the end of the administrative road; but the contractor still has an appeal to the Court of Claims which may redetermine *de novo* what the excessive profits are, 50 U. S. C. App. § 1218 (1970 ed., Supp. II); and from the Court of Claims certiorari may be sought here, *id.*, § 1218a (1970 ed., Supp. II).

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[1] The CFR citations throughout this opinion are to the regulations which were in effect in 1970. The regulations were substantially amended in the fall of 1972.

The history of the Act makes plain what can be inferred from the nature of the administrative process just described—that Congress chose negotiation, not confrontation or traditional adjudication, as the desirable route. The Act requires the Board to "endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits," *id.*, § 1215 (a). The pressure is on the contractor to settle, as at each successive step in the procedure its liability may be increased. The standards are rather vague and imprecise, §§ 1213 (e)(1)–(6),[2] the regulations stating that "[r]easonable profits will be determined in every case by over-all evaluation of the particular factors present and not by the application of any fixed formula with

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[2] Section 1213 (e) provides: "In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:

"(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

"(2) The net worth, with particular regard to the amount and source of public and private capital employed;

"(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

"(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

"(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

respect to rate of profit, or otherwise," 32 CFR § 1460.8. The vagueness of the standards and the risk of an increase in liability at every level of the administrative process have a powerful coercive influence. Approximately 88% of the Board's cases are ended by voluntary agreement, coercive orders being entered in only 12% of the cases. See Fifteenth Annual Report, Renegotiation Board 13 (1970).

In the three cases involved in this litigation the District Court entered its stay orders before the contractors had run the gantlet of the administrative process in the limited sense that each of them had another opportunity to negotiate a lower settlement with the Board, not counting a *de novo* hearing before the Court of Claims.

The documents which the contractors want are in possession of the Board. These documents, it is said, will reveal the strength or weakness of the Board's case against the contractors and the facts or assumptions on which the Board relies in assessing liability. Without those documents, it is said, any meaningful negotiation, envisioned by the Act, is difficult or impossible. Future *de novo* review is not meaningful, it is said, since the contractors are completely in the dark as to the practical considerations which could end the dispute, if the documents were made available. Disclosure of the documents aids negotiation, which is the aim of the Act, and disclosure is necessary and appropriate to carry out the purposes of the Act.

The Court properly holds that the Renegotiation Board is an "agency" within the meaning of the Freedom of Information Act, 5 U. S. C. § 552 (a). The Court also properly holds that § 552 (a)(3), which grants the district court jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant," makes that court the en-

forcement arm of the FOIA. But it denies relief here on the ground that these contractors are obliged to pursue their "administrative remedy" before going to court for an enforcement order.

The Court relies on *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, and other decisions of that vintage which established a judicial "hands off" policy in renegotiation cases until the case had reached the Tax Court (now the Court of Claims) stage. But those cases antedated the FOIA. That Act, contrary to what the Court says, had as one of its purposes "discovery for litigation purposes." Congress was concerned not only with the press and the general public when it lifted the veil of secrecy surrounding federal agencies but also with litigants. According to the Senate Report, the new FOIA was designed in part to "prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it," S. Rep. No. 813, 89th Cong., 1st Sess., 7.

The FOIA deals with problems of discovery, to use a lawyer's term, and it does not leave the formulation of precise rules of discovery exclusively to the agencies themselves but, as noted, makes the district court the enforcement arm of the Act.

Exhaustion of administrative remedies has skeins of various colors, *McKart* v. *United States,* 395 U. S. 185, 193–194. Ordinarily courts do not interfere until the agency has completed its action, *id.,* at 194, "or else has clearly exceeded its jurisdiction," *ibid.* The present case does not entail supplanting administrative expertise on the merits. The issues tendered concern only administrative procedure.

The court errs in saying that the contractors did not exhaust their administrative remedies. They strenuously

sought the information mandated by the FOIA and exhausted all administrative procedure for obtaining it. That right to full disclosure, if not granted now, is forever lost. For as these contractors seek relief at a higher tier of the administrative process, the reviewing body will not consider whether the contractors could have negotiated settlements of a lesser amount if they had had access to the documents whose discovery is involved here. As Judge J. Skelly Wright said below:

> "[I]t should be apparent here that if the contractors are to be granted relief at all they must have it now before the administrative momentum carries their cases beyond the point where the harm can be undone. If we take Congress' declaration of purpose seriously, then the parties are supposed to *negotiate* over excess profits at the lower administrative levels. The seemingly endless *de novo* reviews were intended to make the negotiating process work, not to provide a substitute for negotiation. If the negotiating process fails to occur, the opportunity is lost forever. To say that compulsory awards imposed by the Board or the Court of Claims at the end of the process provide an adequate remedy is to ignore the difference between an agreement freely arrived at, as preferred by Congress, and a judgment imposed by a court of law." 151 U. S. App. D. C. 174, 186, 466 F. 2d 345, 357.

The proceeding in the Court of Claims proscribes review of the Board. Title 50 U. S. C. App. § 1218 (1970 ed., Supp. II) states:

> "A proceeding before the Court of Claims to finally determine the amount, if any, of excessive profits *shall not be treated as a proceeding to review the determination of the Board,* but shall be

> treated as a proceeding de novo." (Emphasis added.)

There is no power, as I see it, for the Court of Claims to remand the case to the Board to cure any irregularity in its procedures. If these contractors are to have the remedy of full disclosure, it is now or never.

A procedure that accelerates settlements furthers the policy of the Renegotiation Act. The Board judges the profits of the contractors involved in the present case with the profits of other contractors in determining whether their profits are excessive. The relative prices, costs, and profits of those other companies are germane to the ultimate issue to be resolved. One of these contractors has a low "front office" overhead, as the executive officer is the president who has only a secretary. The rest of the employees are engaged in production. The contractor who has a low "front office" expense is penalized for efficiency, if its profits are reduced to the scale allowed contractors who have a high "front office" expense. The Board in its Regulations under the FOIA makes "available for public inspection and copying summaries of facts and reasons issued by the Board," 32 CFR § 1480.5 (a). But an agency making decisions has no right to make secret the basis of those decisions,[3] if the FOIA is to have any real meaning in the

[3] The Board in its Regulations also provides:

"When a Regional Board has made . . . a final recommendation in a Class A case, . . . and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board or the Board, as the case may be, will furnish the contractor a written summary of the facts and reasons upon which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement: *Provided*, That the contractor requests such a statement within a reasonable time after it has been advised of such final determina-

activities of the Renegotiation Board. If a contractor does not know the reasons why the Board or any of its agencies cuts the profits of a contractor 95%, it has no meaningful criteria to determine whether it should settle with the Board or continue to pursue its remedies up the escalator of the hierarchy. It is as if a court could rule for the plaintiff or for the defendant without ever having to disclose its reasons.

The result of today's decision is to put the citizen in a game of "blind man's buff" with the Renegotiation Board. Enforcement of the policy of full disclosure under the FOIA is no intrusion in the determination of the merits of the controversy before the Board. The expertise of the Board does not relate to the FOIA but only to the Renegotiation Act. The FOIA merely describes some of the procedure to be followed by the Board. *Aircraft* concerned the intrusion of the judiciary into the administrative process by a suit to declare the whole renegotiating procedure unconstitutional prior to any adjudication of the merits of the contractor's claim. Granting the relief asked in that case would have gutted the statutes. Granting the relief here would merely make the rules of discovery, established by Congress, applicable to the Renegotiation Board. Denial of the relief establishes a regime of secrecy when Congress has demanded disclosure and gives the Renegotiation Board a degree of administrative absolution [4] at war with the philosophy of the FOIA.

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tion or recommendation, *and states that it has submitted all the evidence which it believes to be relevant to the renegotiation proceedings.*" 32 CFR § 1477.3. (Emphasis added.)

[4] The hygienic effect of the Administrative Procedure Act is absent here because the Renegotiation Board is excluded from that Act by reason of 50 U. S. C. App. § 1221, the only exception being found in 5 U. S. C. § 552, at issue in this case.

The trend at the federal level has been the evolution of administrative agencies as principalities of power. The Administrative Procedure Act, 60 Stat. 237, was passed as an antidote to that development. It contained a provision in § 3, 5 U. S. C. § 1002 (1964 ed.), for disclosure of information by the agencies. But it was soon criticized because it was "full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that information is often withheld only to cover up embarrassing mistakes or irregularities and justified by such phrases . . . as—'requiring secrecy in the public interest,' 'required for good cause to be held confidential,' and 'properly and directly concerned.'" S. Rep. No. 1219, 88th Cong., 2d Sess., 8. As the House Report stated in support of supplanting § 3 of the Administrative Procedure Act with the FOIA "Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy." [5] H. R. Rep. No. 1497, 89th Cong., 2d Sess., 6. As respects the role of the courts the House Report stated:

> "The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen

[5] For an account of the operation of the FOIA between 1967 and 1971 see Archibald, Access to Government Information—The Right Before First Amendment, in The First Amendment and the News Media, Final Report, Annual Warren Conference on Advocacy in the United States, June 8–9, 1973, p. 64.

> cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action." *Id.*, at 9.

The reluctance of the Court to require this administrative agency to live under the law calls to mind the admonition of Mr. Justice Stone speaking for the Court in *United States* v. *Morgan*, 307 U. S. 183, 191:

> "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

I would affirm the judgment below.

ALEXANDER *v.* GARDNER-DENVER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 72-5847. Argued November 5, 1973—
Decided February 19, 1974

Following discharge by his employer, respondent company, petitioner, a black, filed a grievance under the collective-bargaining agreement between respondent and petitioner's union, which contained a broad arbitration clause, petitioner ultimately claiming that his discharge resulted from racial discrimination. Upon rejection by the company of petitioner's claims, an arbitration hearing was held, prior to which petitioner filed with the Colorado Civil Rights Commission a racial discrimination complaint which was referred to the Equal Employment Opportunity Commission (EEOC). The arbitrator ruled that petitioner's discharge was for cause. Following the EEOC's subsequent determination that there was not reasonable ground to believe that a violation of Title VII of the Civil Rights Act of 1964 had occurred, petitioner brought this action in District Court, alleging that his discharge resulted from a racially discriminatory employment practice in violation of the Act. The District Court granted respondent's motion for summary judgment, holding that petitioner was bound by the prior arbitral decision and had no right to sue under Title VII. The Court of Appeals affirmed. *Held:* An employee's statutory right to trial *de novo* under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement. Pp. 44–60.

(a) Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination, as may be inferred from the legislative history of Title VII, which manifests a congressional intent to allow an individual to pursue rights under Title VII and other applicable state and federal statutes. Pp. 47–49.

(b) The doctrine of election of remedies is inapplicable in the present context, which involves statutory rights distinctly separate from the employee's contractual rights, regardless of the fact that violation of both rights may have resulted from the same factual occurrence. Pp. 49–51.

(c) By merely resorting to the arbitral forum petitioner did not waive his cause of action under Title VII; the rights conferred thereby cannot be prospectively waived and form no part of the collective-bargaining process. Pp. 51–52.

(d) The arbitrator's authority is confined to resolution of questions of contractual rights, regardless of whether they resemble or duplicate Title VII rights. Pp. 52–54.

(e) In instituting a Title VII action, the employee is not seeking review of the arbitrator's decision and thus getting (as the District Court put it) "two strings to his bow when the employer has only one," but is asserting a right independent of the arbitration process that the statute gives to employees, the only possible victims of discriminatory employment practices. P. 54.

(f) Permitting an employee to resort to the judicial forum after arbitration procedures have been followed does not undermine the employer's incentive to arbitrate, as most employers will regard the benefits from a no-strike pledge in the arbitration agreement as outweighing any costs resulting from giving employees an arbitral antidiscrimination remedy in addition to their Title VII judicial remedy. Pp. 54–55.

(g) A policy of deferral by federal courts to arbitral decisions (as opposed to adoption of a preclusion rule) would not comport with the congressional objective that federal courts should exercise the final responsibility for enforcement of Title VII and would lead to: the arbitrator's emphasis on the law of the shop rather than the law of the land; factfinding and other procedures less complete than those followed in a judicial forum; and perhaps employees bypassing arbitration in favor of litigation. Pp. 55–59.

(h) In considering an employee's claim, the federal court may admit the arbitral decision as evidence and accord it such weight as may be appropriate under the facts and circumstances of each case. Pp. 59–60.

466 F. 2d 1209, reversed.

POWELL, J., delivered the opinion for a unanimous Court.

Paul J. Spiegelman argued the cause for petitioner. With him on the brief was *Russell Specter.*

Robert G. Good argued the cause and filed a brief for respondent.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, Keith A. Jones, Denis F. Gordon, Eileen M. Stein, Joseph T. Eddins,* and *Beatrice Rosenberg.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.* Specifically, we must decide under what circumstances, if any, an employee's statutory right to a trial *de novo* under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

I

In May 1966, petitioner Harrell Alexander, Sr., a black, was hired by respondent Gardner-Denver Co. (the company) to perform maintenance work at the company's plant in Denver, Colorado. In June 1968, petitioner was awarded a trainee position as a drill operator. He remained at that job until his discharge from employment on September 29, 1969. The company informed petitioner that he was being discharged for producing too many defective or unusable parts that had to be scrapped.

*Briefs of *amici curiae* urging affirmance were filed by *Milton A. Smith* and *Jay S. Siegel* for the Chamber of Commerce of the United States, and by *Gerard C. Smetana, Lawrence M. Cohen,* and *Alan Raywid* for the American Retail Federation.

On October 1, 1969, petitioner filed a grievance under the collective-bargaining agreement in force between the company and petitioner's union, Local No. 3029 of the United Steelworkers of America (the union). The grievance stated: "I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay." No explicit claim of racial discrimination was made.

Under Art. 4 of the collective-bargaining agreement, the company retained "the right to hire, suspend or discharge [employees] for proper cause." [1] Article 5, § 2, provided, however, that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry," [2] and Art. 23, § 6 (a), stated that "[n]o employee will be discharged, suspended or given a written warning notice except for just cause."

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[1] Article 4 of the agreement provided:

"MANAGEMENT

"The Union recognizes that all rights to manage the Plant, to determine the products to be manufactured, the methods of manufacturing or assembling, the scheduling of production, the control of raw materials, and to direct the working forces, including the right to hire, suspend or discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reasons, and the right to maintain order and efficiency are vested exclusively in the Company.

"It is understood by the parties that all rights recognized in this Article are subject to the terms of this Agreement."

[2] Article 5 of the agreement provided:

"MUTUAL RESPONSIBILITY

"*Section 1.* The parties agree that during the term of this Agreement there shall be no strike, slow-down or other interruption of production, and that for the same period there shall be no lockout, subject to the provisions of Article 26, Term of Agreement.

"*Section 2.* The Company and the Union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry. The Company further states and the Union approves that no such discrimination shall be practiced against any applicant for employment."

The agreement also contained a broad arbitration clause covering "differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant." [3] Disputes were to be submitted to a multi-

[3] Article 23, containing the grievance-arbitration procedures of the agreement, provided in relevant part:

. . . . . .

"*Section 5.* Should differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement, or should any trouble arise in the plant, there shall be no suspension of work, but an earnest effort shall be made by both the Company and the Union to settle such differences promptly. Grievances must be presented within five (5) working days after the date of the occurrence giving rise to the grievance or they shall be considered waived. Grievances shall be taken up in the following manner; except that any grievance filed by the Local Union shall be submitted in writing at Step 3 of the grievance procedure as set forth herein:

"*Step 1.* An attempt shall first be made by the employee with or without his assistant grievance committeeman (at the employee's option), and the employee's foreman to settle the grievance. The foreman shall submit his answer within one (1) working day and if the grievance is not settled, it shall be reduced to writing, signed by the employee and his assistant grievance committeeman, and the foreman shall submit his signed answer of such grievance.

"*Step 2.* If the grievance is not settled in Step 1, it shall be presented to the Superintendent, or his representative, within two (2) working days after the Union has received the Foreman's answer in Step 1. The Superintendent or his representative shall submit his signed answer two (2) working days after receiving the grievance.

"*Step 3.* If the grievance is not settled in Step 2, it shall be presented to the manager of Manufacturing or his representative within five (5) working days after the Union has received the Superintendent's answer in Step 2. The Manager of Manufacturing or his representative shall meet with the representatives of the Union to attempt to resolve the grievance within five (5) working days following the presentation of the grievance. The Manager of

step grievance procedure, the first four steps of which involved negotiations between the company and the union. If the dispute remained unresolved, it was to be remitted to compulsory arbitration. The company and the union were to select and pay the arbitrator, and

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Manufacturing or his representative shall submit his signed answer within three (3) working days after the date of such meeting.

"*Step 4.* If the grievance is not settled in Step 3, it shall be referred to the Personnel Manager, and/or his representatives, and the International representative and chairman of the grievance committee within five (5) working days after the Union has received the Step 3 answer. Within ten (10) working days after the grievance has been referred to Step 4, the above mentioned parties shall meet for the purpose of discussing such grievance. Within five (5) working days following the meeting, the Company representatives shall submit their signed answer to the Union. The Union representatives shall signify their concurrence or non-concurrence and affix their signatures to the grievance.

"*Step 5.* Grievances which have not been settled under the foregoing procedure may be referred to arbitration by notice in writing within ten (10) calendar days after the date of the Company's final answer in Step 4. Within five (5) days after receipt of referral to arbitration the parties shall select an impartial arbitrator.

"Should the parties be unable to agree upon an arbitrator, the selection shall be made by the Senior Judge of the U. S. Circuit Court of Appeals for the Tenth Circuit. The decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved. The expenses and fee of the arbitrator shall be divided equally between the Company and the Union. The arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement.

"*Section 6.* (a) No employee will be discharged, suspended or given a written warning notice except for just cause.

. . . . . .

"(g) Should it be determined that the employee has been unjustly suspended or discharged the Company shall reinstate the employee and pay full compensation at the employee's basic hourly rate or earned rate, whichever is the higher, for the time lost."

his decision was to be "final and binding upon the Company, the Union, and any employee or employees involved." The agreement further provided that "[t]he arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement." The parties also agreed that there "shall be no suspension of work" over disputes covered by the grievance-arbitration clause.

The union processed petitioner's grievance through the above machinery. In the final pre-arbitration step, petitioner raised, apparently for the first time, the claim that his discharge resulted from racial discrimination. The company rejected all of petitioner's claims, and the grievance proceeded to arbitration. Prior to the arbitration hearing, however, petitioner filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission on November 5, 1969.

At the arbitration hearing on November 20, 1969, petitioner testified that his discharge was the result of racial discrimination and informed the arbitrator that he had filed a charge with the Colorado Commission because he "could not rely on the union." The union introduced a letter in which petitioner stated that he was "knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I . . . have been the target of preferential discriminatory treatment." The union representative also testified that the company's usual practice was to transfer unsatisfactory trainee drill operators back to their former positions.

On December 30, 1969, the arbitrator ruled that petitioner had been "discharged for just cause." He made no reference to petitioner's claim of racial discrimination.

The arbitrator stated that the union had failed to produce evidence of a practice of transferring rather than discharging trainee drill operators who accumulated excessive scrap, but he suggested that the company and the union confer on whether such an arrangement was feasible in the present case.

On July 25, 1970, the Equal Employment Opportunity Commission determined that there was not reasonable cause to believe that a violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, had occurred. The Commission later notified petitioner of his right to institute a civil action in federal court within 30 days. Petitioner then filed the present action in the United States District Court for the District of Colorado, alleging that his discharge resulted from a racially discriminatory employment practice in violation of § 703 (a) (1) of the Act, 42 U. S. C. § 2000e–2 (a)(1).

The District Court granted respondent's motion for summary judgment and dismissed the action. 346 F. Supp. 1012 (1971). The court found that the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to petitioner.[4] It then held that petitioner, having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII. The Court of Appeals for the Tenth Circuit affirmed *per curiam* on the basis of the District Court's opinion. 466 F. 2d 1209 (1972).

We granted petitioner's application for certiorari. 410 U. S. 925 (1973). We reverse.

[4] In reaching this conclusion, the District Court relied on petitioner's deposition acknowledging that he had raised the racial discrimination claim during the arbitration hearing. 346 F. Supp., at 1014.

II

Congress enacted Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971). Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. In the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.

Even in its amended form, however, Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. 42 U. S. C. §§ 2000e–5 (f) and (g) (1970 ed., Supp. II). Courts retain these broad remedial powers despite a Commission finding of no reasonable cause to believe that the Act has been violated. *Mc-*

Donnell Douglas Corp. v. *Green, supra,* at 798–799. Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.

In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII. 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. II). In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices. *Hutchings* v. *United States Industries,* 428 F. 2d 303, 310 (CA5 1970); *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711, 715 (CA7 1969); *Jenkins* v. *United Gas Corp.,* 400 F. 2d 28, 33 (CA5 1968). See also *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400, 402 (1968).

Pursuant to this statutory scheme, petitioner initiated the present action for judicial consideration of his rights under Title VII. The District Court and the Court of Appeals held, however, that petitioner was bound by the prior arbitral decision and had no right to sue under Title VII.[5] Both courts evidently thought that this result was

[5] The District Court recognized that a conflict of authorities existed on this issue but chose to rely on *Dewey* v. *Reynolds Metals Co.,* 429 F. 2d 324, 332 (CA6 1970), affirmed by an equally divided Court, 402 U. S. 689 (1971). There, the Sixth Circuit held that prior submission of an employee's claim to arbitration under a collective-bargaining agreement precluded a later suit under Title VII. The Sixth Circuit appears to have since retreated in part from *Dewey* by suggesting that there is no preclusion where both arbitration and "court or agency processes" are pursued simultaneously. See *Spann* v. *Kaywood Division, Joanna Western Mills Co.,* 446 F. 2d

dictated by notions of election of remedies and waiver and by the federal policy favoring arbitration of labor disputes, as enunciated by this Court in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957), and the *Steelworkers* trilogy.[6] See also *Boys Markets* v.

120, 122 (1971). The Fifth, Seventh, and Ninth Circuits have squarely rejected a preclusion rule. See *Hutchings* v. *United States Industries*, 428 F. 2d 303 (CA5 1970); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (CA7 1969); *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d 569 (CA9 1973).

[6] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). In *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957), this Court held that a grievance-arbitration provision of a collective-bargaining agreement could be enforced against unions and employers under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185. The Court noted that the congressional policy, as embodied in § 203 (d) of the LMRA, 61 Stat. 154, 29 U. S. C. § 173 (d), was to promote industrial peace and that the grievance-arbitration provision of a collective agreement was a major factor in achieving this goal. 353 U. S., at 455. In the *Steelworkers* trilogy, the Court further advanced this policy by declaring that an order to arbitrate will not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *supra*, at 582–583. The Court also stated that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, *supra*, at 599. And in *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), the Court held that grievance-arbitration procedures of a collective-bargaining agreement must be exhausted before an employee may file suit to enforce contractual rights.

For the reasons stated in Parts III, IV, and V of this opinion, we hold that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII.

Retail Clerks Union, 398 U. S. 235 (1970); *Gateway Coal Co.* v. *United Mine Workers of America,* 414 U. S. 368 (1974). We disagree.

III

Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U. S. C. §§ 2000e–5 (b), (e), and (f). See *McDonnell Douglas Corp.* v. *Green, supra,* at 798. There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction.

In addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination.[7] In the Civil Rights Act of 1964, 42 U. S. C. § 2000a *et seq.,* Congress indicated that it considered the policy against discrimination to be of the "highest priority." *Newman* v. *Piggie Park Enterprises, supra,* at 402. Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. See 42 U. S. C. § 2000e–5 (b) (1970 ed., Supp. II) (EEOC); 42 U. S C. § 2000e–5 (c) (1970 ed., Supp. II) (state and local agencies); 42 U. S. C. § 2000e–5 (f) (1970 ed., Supp. II) (federal courts). And, in general, submission of a

[7] See, *e. g.,* 42 U. S. C. § 1981 (Civil Rights Act of 1866); 42 U. S. C. § 1983 (Civil Rights Act of 1871).

claim to one forum does not preclude a later submission to another.[8] Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.[9] The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions re-

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[8] For example, Commission action is not barred by "findings and orders" of state or local agencies. See 42 U. S. C. § 2000e–5 (b) (1970 ed., Supp. II). Similarly, an individual's cause of action is not barred by a Commission finding of no reasonable cause to believe that the Act has been violated. See 42 U. S. C. § 2000e–5 (f) (1970 ed., Supp. II); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

[9] For example, Senator Joseph Clark, one of the sponsors of the bill, introduced an interpretive memorandum which stated: "Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. . . . [T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong Rec. 7207 (1964). Moreover, the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices. 110 Cong. Rec. 13650–13652 (1964). And a similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972. See H. R. 9247, 92d Cong., 1st Sess. (1971); H. R. Rep. No. 92–238 (1971). See also 2 U. S. Code Cong. & Ad. News, 92d Cong., 2d Sess., 2137, 2179, 2181–2182 (1972). The report of the Senate Committee responsible for the 1972 Act explained that neither the "provisions regarding the individual's right to sue under title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws." S. Rep. No. 92–415, p. 24 (1971). For a detailed discussion of the legislative history of the 1972 Act, see Sape & Hart, Title VII Reconsidered: The Equal Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972).

lating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

In reaching the opposite conclusion, the District Court relied in part on the doctrine of election of remedies.[10] That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent,[11] has no application in the present context. In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statu-

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[10] The District Court adopted the reasoning of the Sixth Circuit in *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d, at 332, affirmed by an equally divided Court, 402 U. S. 689 (1971), which was apparently based in part on the doctrine of election of remedies. See n. 5, *supra*. The Sixth Circuit, however, later described *Dewey* as resting instead on the doctrine of equitable estoppel and on "themes of res judicata and collateral estoppel." *Newman* v. *Avco Corp.*, 451 F. 2d 743, 747 n. 1 (1971). Whatever doctrinal label is used, the essence of these holdings remains the same. The policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel.

[11] See generally 5A A. Corbin, Contracts §§ 1214–1227 (1964 ed. and Supp. 1971). Most courts have recognized that the doctrine of election of remedies does not apply to suits under Title VII. See, *e. g.*, *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d, at 714–715; *Hutchings* v. *United States Industries*, 428 F. 2d, at 314; *Macklin* v. *Spector Freight Systems*, 156 U. S. App. D. C. 69, 80–81, 478 F. 2d 979, 990–991 (1973); *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d 889, 893–894 (CA2 1971), cert. denied, 406 U. S. 918 (1972); *Newman* v. *Avco Corp.*, *supra*, at 746 n. 1; *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d, at 572–573.

tory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended,[12] where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act. *Carey* v. *Westinghouse Corp.*, 375 U. S. 261 (1964).[13] Cf. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). There, as here, the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies under-

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[12] 61 Stat. 136, 29 U. S. C. § 151 *et seq.*

[13] As the Court noted in *Carey:*

"By allowing the dispute to go to arbitration . . . those conciliatory measures which Congress deemed vital to 'industrial peace' . . . and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area." 375 U. S., at 272.

Should disagreements arise between the Board and the arbitrator, the Board's ruling would, of course, take precedence as to those issues within its jurisdiction. *Ibid.*

lying each. Thus, the rationale behind the election-of-remedies doctrine cannot support the decision below.[14]

We are also unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956); *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970). These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of

[14] Nor can it be maintained that election of remedies is required by the possibility of unjust enrichment through duplicative recoveries. Where, as here, the employer has prevailed at arbitration, there, of course, can be no duplicative recovery. But even in cases where the employee has first prevailed, judicial relief can be structured to avoid such windfall gains. See, *e. g.*, *Oubichon* v. *North American Rockwell Corp.*, *supra*; *Bowe* v. *Colgate-Palmolive Co.*, *supra*. Furthermore, if the relief obtained by the employee at arbitration were fully equivalent to that obtainable under Title VII, there would be no further relief for the court to grant and hence no need for the employee to institute suit.

prospective waiver. See *Wilko* v. *Swan*, 346 U. S. 427 (1953).

The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement,[15] mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332, 338–339 (1944).

Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government.[16]

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[15] In this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII.

[16] See Meltzer, Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination, 39 U. Chi. L. Rev. 30, 32–35 (1971); Meltzer, Ruminations About Ideology, Law, and

As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960).

If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. *Ibid.* Thus the arbitrator has authority to resolve only ques-

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Labor Arbitration, 34 U. Chi. L. Rev. 545 (1967). As the late Dean Shulman stated:

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement." Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016 (1955).

tions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

IV

The District Court and the Court of Appeals reasoned that to permit an employee to have his claim considered in both the arbitral and judicial forums would be unfair since this would mean that the employer, but not the employee, was bound by the arbitral award. In the District Court's words, it could not "accept a philosophy which gives the employee two strings to his bow when the employer has only one." 346 F. Supp., at 1019. This argument mistakes the effect of Title VII. Under the *Steelworkers* trilogy, an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process. An employer does not have "two strings to his bow" with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices. *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d 569, 573 (CA9 1973).

The District Court and the Court of Appeals also thought that to permit a later resort to the judicial forum would undermine substantially the employer's incentive to arbitrate and would "sound the death knell for arbitration clauses in labor contracts." 346 F. Supp., at 1019. Again, we disagree. The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike. As the

Court stated in *Boys Markets* v. *Retail Clerks Union,* 398 U. S., at 248, "a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration." It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII. Indeed, the severe consequences of a strike may make an arbitration clause almost essential from both the employees' and the employer's perspective. Moreover, the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

V

Respondent contends that even if a preclusion rule is not adopted, federal courts should defer to arbitral decisions on discrimination claims where: (i) the claim

was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy.[17] Under respondent's proposed rule, a court would grant summary judgment and dismiss the employee's action if the above conditions were met. The rule's obvious consequence in the present case would be to deprive the petitioner of his statutory right to attempt to establish his claim in a federal court.

At the outset, it is apparent that a deferral rule would be subject to many of the objections applicable to a preclusion rule. The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. Furthermore, we have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." *U. S. Bulk Carriers v. Arguelles*, 400 U. S. 351, 359–360 (1971) (Harlan, J., concurring). Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the

[17] Brief for Respondent 37. Respondent's proposed rule is analogous to the NLRB's policy of deferring to arbitral decisions on statutory issues in certain cases. See *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080, 1082 (1955).

requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581–583 (1960).[18] Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under

[18] See also Gould, Labor Arbitration of Grievances Involving Racial Discrimination, 118 U. Pa. L. Rev. 40, 47–48 (1969); Platt, The Relationship between Arbitration and Title VII of the Civil Rights Act of 1964, 3 Ga. L. Rev. 398 (1969). Significantly, a substantial proportion of labor arbitrators are not lawyers. See Note, The NLRB and Deference to Arbitration, 77 Yale L. J. 1191, 1194 n. 28 (1968). This is not to suggest, of course, that arbitrators do not possess a high degree of competence with respect to the vital role in implementing the federal policy favoring arbitration of labor disputes.

oath, are often severely limited or unavailable. See *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203 (1956); *Wilko* v. *Swan*, 346 U. S., at 435–437. And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S., at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.[19]

It is evident that respondent's proposed rule would not allay these concerns. Nor are we convinced that the solution lies in applying a more demanding deferral standard, such as that adopted by the Fifth Circuit in *Rios* v. *Reynolds Metals Co.*, 467 F. 2d 54 (1972).[20] As

[19] A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. See *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965). In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. See *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944). Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. See, *e. g.*, *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210 (1944). And a breach of the union's duty of fair representation may prove difficult to establish. See *Vaca* v. *Sipes*, *supra*; *Humphrey* v. *Moore*, 375 U. S. 335, 342, 348–351 (1964). In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers. See 42 U. S. C. § 2000e–2 (c).

[20] In *Rios*, the court set forth the following deferral standard: "First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way

respondent points out, a standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make *de novo* determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights.

A deferral rule also might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.

We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause

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violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant." 467 F. 2d, at 58. For a discussion of the problems posed by application of the *Rios* standard, see Note, Judicial Deference to Arbitrators' Decisions in Title VII Cases, 26 Stan. L. Rev. 421 (1974).

of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.[21]

The judgment of the Court of Appeals is

Reversed.

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[21] We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. *v.* MURRAY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72–403. Argued November 14, 1973—
Decided February 19, 1974

Upon being notified that she was going to be discharged on a specific date from her position as a probationary Government employee, respondent filed this action claiming that the applicable Civil Service regulations for discharge of probationary employees had not been followed, and seeking a temporary injunction against her dismissal pending an administrative appeal to the Civil Service Commission (CSC). The District Court granted a temporary restraining order, and after an adversary hearing at which the Government declined to produce the discharging official as a witness to testify as to the reasons for the dismissal, ordered the temporary injunctive relief continued. The Court of Appeals affirmed, rejecting the Government's contention that the District Court had no authority to grant temporary injunctive relief in this class of cases, and holding that the relief granted was within the permissible bounds of the District Court's discretion. *Held:* While the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, nevertheless under the standards that must govern the issuance of such relief the District Court's issuance of the temporary injunctive relief here cannot be sustained. Pp. 68–92.

(a) The District Court's authority to review agency action, *Service* v. *Dulles*, 354 U. S. 363, does not come into play until it may be authoritatively said that the administrative decision to discharge an employee does in fact fail to conform to the applicable regulations, and until administrative action has become final, no court is in a position to say that such action did or did not conform to the regulations. Here the District Court authorized, on an interim basis, relief that the CSC had neither considered nor authorized—the mandatory reinstatement of respondent in her Government position. *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4; *FTC* v. *Dean Foods Co.*, 384 U. S. 597, distinguished. Pp. 71–78.

(b) Considering the disruptive effect that the grant of temporary relief here was likely to have on the administrative process, and in view of the historical denial of all equitable relief by federal courts in disputes involving discharge of Government employees; the well-established rule that the Government be granted the widest latitude in handling its own internal affairs; and the traditional unwillingness of equity courts to enforce personal service contracts, the Court of Appeals erred in routinely applying the traditional standards governing more orthodox "stays," and respondent at the very least must show irreparable injury sufficient in kind and degree to override the foregoing factors. Pp. 78–84.

(c) Viewing the order at issue as a preliminary injunction, the Court of Appeals erred in suggesting that at this stage of the proceeding the District Court need not have concluded that there was actually irreparable injury, and in intimating that, as alleged in respondent's unverified complaint, either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury. Pp. 84–92.

149 U. S. App. D. C. 256, 462 F. 2d 871, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 92. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 97.

Keith A. Jones argued the cause for petitioners. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Wood, Acting Assistant Attorney General Jaffe, Samuel Huntington,* and *Walter H. Fleischer.*

Thomas J. McGrew argued the cause for respondent *pro hac vice.* With him on the brief was *James A. Dobkin.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent is a probationary employee in the Public Buildings Service of the General Services Administration (GSA). In May 1971, approximately four months

after her employment with GSA began, she was advised in writing by the Acting Commissioner of the Public Buildings Service, W. H. Sanders, that she would be discharged from her position on May 29, 1971. She then filed this action in the United States District Court for the District of Columbia, seeking to temporarily enjoin her dismissal pending her pursuit of an administrative appeal to the Civil Service Commission. The District Court granted a temporary restraining order, and after an adversary hearing extended the interim injunctive relief in favor of respondent until the Acting Commissioner of the Public Buildings Service testified about the reasons for respondent's dismissal.

A divided Court of Appeals for the District of Columbia Circuit affirmed,[1] rejecting the Government's contention that the District Court had no authority whatever to grant temporary injunctive relief in this class of cases, and holding that the relief granted by the District Court in this particular case was within the permissible bounds of its discretion. We granted certiorari, *sub nom. Kunzig* v. *Murray*, 410 U. S. 981 (1973). We agree with the Court of Appeals that the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, but conclude that, judged by the standards which we hold must govern the issuance of such relief, the issuance of the temporary injunctive relief by the District Court in this case cannot be sustained.

I

Respondent was hired as a program analyst by the Public Buildings Service after previous employment in the Defense Intelligence Agency. Under the regulations

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[1] *Murray* v. *Kunzig*, 149 U. S. App. D. C. 256, 462 F. 2d 871 (1972). For a discussion of the Court of Appeals' jurisdiction, and the jurisdiction of this Court, see *infra*, at 86–88.

of the Civil Service Commission, this career conditional appointment was subject to a one-year probationary period.[2] Applicable regulations provided that respondent, during this initial term of probation, could be dismissed without being afforded the greater procedural advantages available to permanent employees in the competitive service.[3] The underlying dispute between the parties arises over whether the more limited procedural requirements applicable to probationary employees were satisfied by petitioners in this case.

The procedural protections which the regulations accord to most dismissed probationary employees are limited. Commonly a Government agency may dismiss a probationary employee found unqualified for continued employment simply "by notifying him in writing as to why he is being separated and the effective date of the action." [4] More elaborate procedures are specified when the ground for terminating a probationary employee is "for conditions arising before appointment." [5] In such cases the regulations require that the employee receive "an advance written notice stating the reasons, specifically and in detail, for the proposed action"; that the employee be given an opportunity to respond in writing and to furnish affidavits in support of his response; that the agency "consider" any answer filed by the employee in reaching its decision; and that the employee be notified of the agency's decision at the earliest practicable date.[6] Respondent contends that her termina-

[2] 5 CFR § 315.801.

[3] Compare 5 CFR §§ 315.801–315.807 with 5 CFR § 752.101 *et seq.*

[4] 5 CFR § 315.804.

[5] 5 CFR § 315.805.

[6] Section 315.805 reads in full:

"§ 315.805 Termination of probationers for conditions arising before appointment.

"When an agency proposes to terminate an employee serving a

tion was based in part on her activities while in the course of her previous employment in the Defense Intelligence Agency, and that therefore she was entitled to an opportunity to file an answer under this latter provision.

The letter which respondent received from the Acting Commissioner, notifying her of the date of her discharge, stated that the reason for her discharge was her "complete unwillingness to follow office procedure and to accept direction from [her] supervisors." After receipt of the letter, respondent's counsel met with a GSA personnel officer to discuss her situation and, in the course of the meeting, was shown a memorandum prepared by an officer of the Public Buildings Service upon which Sanders apparently based his decision to terminate respondent's employment. The memorandum contained both a discussion of respondent's conduct in her job with the Public Buildings Service and a discussion of her conduct during her previous employment at the Defense

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probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

"(a) *Notice of proposed adverse action.* The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

"(b) *Employee's answer.* The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

"(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806 (d)."

Intelligence Agency. Relying upon the inclusion of the information concerning her previous employment, respondent's counsel requested that she be given a detailed statement of the charges against her and an opportunity to reply—the procedures to which she would be entitled under the regulations if in fact the basis of her discharge had been conduct during her previous employment. This request was denied.

Respondent then filed an administrative appeal with the Civil Service Commission pursuant to the provisions of 5 CFR § 315.806 (c), alleging that her termination was subject to § 315.805 and was not effected in accordance with the procedural requirements of that section.[7] While her administrative appeal was pending undecided, she filed this action. Her complaint alleged that the agency had failed to follow the appropriate Civil Service regulations, alleged that her prospective discharge would deprive her of income and cause her to suffer the embarrassment of being wrongfully discharged, and requested a temporary restraining order and interim injunctive relief against her removal from employment pending agency determination of her appeal. The District Court granted the temporary restraining order at the time of the filing of respondent's complaint, and set a hearing on the application for a temporary injunction for the following week.

At the hearing on the temporary injunction, the District Court expressed its desire to hear the testimony of Sanders in person, and refused to resolve the controversy on the basis of his affidavit which the Government offered to furnish. When the Government declined

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[7] Section 315.806 (c) reads:

"A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section."

to produce Sanders, the court ordered the temporary injunctive relief continued, stating that "Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim." [8] The Government, desiring to test the authority of the District Court to enter such an order, has not produced Sanders, and the interim relief awarded respondent continues in effect at this time.

On the Government's appeal to the Court of Appeals for the District of Columbia Circuit, the order of the District Court was affirmed. Although recognizing that "Congress presumably could remove the jurisdiction of the District Courts to grant such equitable interim relief, in light of the remedies available," [9] the court found that the District Court had the power to grant relief in the absence of an explicit prohibition from Congress. The Court of Appeals decided that the District Court acted within the bounds of permissible discretion in requiring Sanders to appear and testify,[10] and in continuing the temporary injunctive relief until he was produced as a witness by the Government.

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[8] The order of the District Court stated in full:

"It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending the appearance before this Court of Mr. W. H. Sanders, Acting Commissioner, Public Buildings Service, should issue because, unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim,

"NOW, THEREFORE, IT IS ORDERED, that the Temporary Restraining Order issued by this Court at twelve o'clock p. m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders.

"IT IS FURTHER ORDERED that a copy of this Order be served by the United States Marshal on Defendants forthwith."

[9] 149 U. S. App. D. C., at 262 n. 21, 462 F. 2d, at 877 n. 21.

[10] *Id.*, at 263–264, 462 F. 2d, at 878–879.

II

While it would doubtless be intellectually neater to completely separate the question whether a District Court has authority to issue any temporary injunctive relief at the behest of a discharged Government employee from the question whether the relief granted in this case was proper, we do not believe the questions may be thus bifurcated into two watertight compartments. We believe the basis for our decision can best be illuminated by taking up the various arguments which the parties urge upon us.

Petitioners point out, and the Court of Appeals below apparently recognized, that Congress has given the District Courts no express statutory authorization to issue temporary "stays" in Civil Service cases. Although Congress has often specifically conferred such authority when it so desired—for example, in the enabling statutes establishing the NLRB,[11] the FTC,[12] the FPC,[13] and the SEC[14]—the statutes governing the Civil Service Commission are silent on the question.[15] The rules and regu-

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[11] 29 U. S. C. §§ 160 (j), (*l*).

[12] 15 U. S. C. § 53 (a).

[13] 16 U. S. C. § 825m (a).

[14] 15 U. S. C. §§ 77t (b), 78u (e).

[15] Respondent does suggest that 5 U. S. C. § 705 may confer authority to grant relief in this case. That section reads:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

The relevant legislative history of that section, however, indicates

lations promulgated pursuant to a broad grant of statutory authority likewise make no provision for interlocutory judicial intervention.

The Court of Appeals nevertheless found that the district courts had traditional power to grant stays in such personnel cases. Commenting upon the Government's arguments for reversal below, the court stated:

> "It is asserted that the Civil Service Commission has been given exclusive review jurisdiction. But, as noted initially, there is no statutory power in the Civil Service Commission to grant a temporary stay of discharge. Prior to the Civil Service Act a United States District Court would certainly have had jurisdiction and power to grant such temporary relief. The statute did not explicitly take it away, nor implicitly by conferring such jurisdiction and power on the CSC; we hold the District Court still has jurisdiction and may exercise the power under established standards in appropriate circumstances." [16]

If the issue were to turn solely on the earlier decisions of this Court examining the authority of federal courts to intervene in disputes about governmental employment, we think this assumption of the Court of Appeals is wrong. In *Keim* v. *United States,* 177 U. S. 290 (1900), this Court held that the Court of Claims had no authority to award damages to an employee who claimed he

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that it was primarily intended to reflect existing law under the *Scripps-Howard* doctrine, discussed *infra,* and not to fashion new rules of intervention for District Courts. See S. Rep. No. 752, 79th Cong., 1st Sess., 27, 44 (1945). Thus respondent's various contentions may be grouped under her primary theory discussed in the text.

[16] 149 U. S. App. D. C., at 265, 462 F. 2d, at 880 (footnotes omitted).

had been wrongfully discharged by his federal employer.[17] In *White* v. *Berry*, 171 U. S. 366 (1898), a Government employee had sought to enjoin his employer from dismissing him from office, alleging that the removal would violate both the Civil Service Act and the applicable regulations.[18] The Circuit Court assumed jurisdiction and issued an order prohibiting the defendant from inter-

[17] The Court there expressed the traditional judicial deference to administrative processes in the following terms:

"The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

"In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. 'It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.' *In re Hennen*, 13 Pet. 230, 259; *Parsons* v. *United States*, 167 U. S. 324. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed." 177 U. S., at 293–294.

[18] The plaintiff in *White* protested that he was being discharged because of his political affiliation, a basis for discharge specifically prohibited under the Civil Service rules. 171 U. S., at 367–368. Such a contention obviously went to the heart of the Civil Service legislation, since a primary purpose of that system was to remove large sectors of Government employment from the political "spoils system" which had previously played a large part in the selection and discharge of Government employees. See generally H. Kaplan, The Law of Civil Service 1–22 (1958).

fering with the plaintiff's discharge of his duty " 'until he shall be removed therefrom by proper proceedings had under the Civil Service Act and the rules and regulations made thereunder or by judicial proceedings at law . . . .' " [19] This Court reversed. Discussing the apparently well-established principle that " 'a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee,' " [20] the Court held that "the Circuit Court, sitting in equity, was without jurisdiction to grant the relief asked." [21]

Respondent's case, then, must succeed, if at all, despite earlier established principles regarding equitable intervention in disputes over tenure of governmental employees, and not because of them. Much water has flowed over the dam since 1898, and cases such as *Service* v. *Dulles,* 354 U. S. 363 (1957), cited by the District Court in its memorandum opinion in this case, establish that federal courts do have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed administrative regulations.[22] In that case, however, judicial pro-

[19] 171 U. S., at 374–375.

[20] The Court quoted from *Morgan* v. *Nunn,* 84 F. 551 (CCMD Tenn. 1898), and noted that "[s]imilar decisions have been made in other Circuit Courts of the United States." 171 U. S., at 377–378.

[21] *Id.,* at 378.

[22] In *Service* an employee discharged under the provisions of the McCarran Rider, 65 Stat. 581, contended that the Secretary of State had not followed departmental regulations in effecting his dismissal. This Court agreed with plaintiff's position and decided that his "dismissal cannot stand." 354 U. S., at 388. However, the employee in that case had made a full effort to secure administrative review of his discharge prior to filing suit in the District Court. These efforts, as the Court noted, *id.,* at 370, had "proved unsuccessful." In the present case respondent has petitioned the court before ascertaining whether administrative relief will be granted.

ceedings were not commenced until the administrative remedy had been unsuccessfully pursued.[23] The fact that Government personnel decisions are now ultimately subject to the type of judicial review sought in *Service* v. *Dulles, supra,* does not, without more, create the authority to issue interim injunctive relief which was held lacking in cases such as *White* v. *Berry, supra.*

The Court of Appeals found support for its affirmance of the District Court's grant of injunctive relief in *Scripps-Howard Radio* v. *FCC,* 316 U. S. 4 (1942). In *Scripps-Howard* the licensee of a Cincinnati radio station petitioned the FCC to vacate an order permitting a Columbus radio station to change its frequency and to increase its broadcasting power. The licensee also requested a hearing. When the Commission denied the petition, the licensee filed a statutory appeal in the Court of Appeals for the District of Columbia and, in conjunction with the docketing of the appeal, asked the court to stay the FCC order pending its decision. The Court of Appeals, apparently departing from a longstanding policy of issuing such stays,[24] declined to do so in this case and ultimately certified the question of its power to this Court.[25]

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[23] See n. 22, *supra.*

[24] The Court pointed out that "even though the Radio Act of 1927 contained no provisions dealing with the authority for the Court of Appeals for the District of Columbia to stay orders of the Commission on appeal, the Court had been issuing stays as a matter of course wherever they were found to be appropriate, without objection by the Commission." *Scripps-Howard Radio* v. *FCC,* 316 U. S. 4, 13 (1942).

[25] The precise question certified was:

" 'Where, pursuant to the provisions of Section 402 (b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the

This Court held that the Court of Appeals had power to issue the stay, analogizing it to the traditional stay granted by an appellate court pending review of an inferior court's decision:

> "It has always been held, therefore, that as part of its traditional equipment for the administration of justice,[*] a federal court can stay the enforcement of a judgment pending the outcome of an appeal." [26]

But in *Scripps-Howard* the losing party before the agency sought an interim stay of final agency action pending statutory judicial review.[27] A long progression of cases in this Court had established the authority of a court, empowered by statute to exercise appellate jurisdiction, to issue appropriate writs in aid of that jurisdiction.[28] The All Writs Act, first enacted as a part of the Judiciary Act of 1789, provided statutory confirmation of this

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Commission's order from which the appeal was taken, pending the determination of the appeal?'" *Id.*, at 6.

The wording of the question certified makes clear that the Court was faced only with the situation in which an appeal has been filed seeking review of completed agency action.

[26] *Id.*, at 9–10. In the Court's opinion a footnote, herein designated with an asterisk, referred to the All Writs Act, 28 U. S. C. § 1651 (a), which reads:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The reliance of the Court on this provision was noted by the Court of Appeals in its opinion in this case. 149 U. S. App. D. C., at 261 n. 17, 462 F. 2d, at 876 n. 17.

[27] See n. 25, *supra*.

[28] For example, the two cases cited by the Court in *Scripps-Howard* involved situations in which a court accepted appeal jurisdiction and, in connection with that acceptance, issued a stay of the decision below. See *In re Claasen*, 140 U. S. 200 (1891) (writ of error to this Court); *In re McKenzie*, 180 U. S. 536 (1901) (appeal taken to the Circuit Court of Appeals). The All Writs Act, n. 26, *supra*, provided the authority in each case.

authority.[29] This Court in *Scripps-Howard* held that the same principles governed the authority of courts charged by statute with judicial review of agency decisions, and that the authority to grant a stay exists in such a court even though not expressly conferred by the statute which confers appellate jurisdiction.

Scripps-Howard, supra, of course, is not the instant case. The authority of the District Court to review agency action under *Service* v. *Dulles, supra,* does not come into play until it may be authoritatively said that the administrative decision to discharge an employee does in fact fail to conform to applicable regulations.[30] Until administrative action has become final, no court is in a position to say that such action did or did not conform to applicable regulations. Here respondent had obtained no administrative determination of her appeal at the time she brought the action in the District Court. She was in effect asking that court to grant her, on an interim basis, relief which the administrative agency charged with review of her employer's action could grant her only after it had made a determination on the merits.

While both the District Court and the Court of Appeals characterized the District Court's intervention as a "stay," the mandatory retention of respondent in the position from which she was dismissed actually served to provide the most extensive relief which she might conceivably obtain from the agency after its review on the merits. It may well be that the Civil Service Commission, should it have agreed with respondent's version of the basis for her dismissal, would prohibit the final

[29] See n. 26, *supra.*

[30] See n. 22, *supra.* As noted above, the employee in *Service* sought to have the Secretary's action declared invalid within the administrative system. He sought judicial relief only after it became evident that no administrative relief would be forthcoming.

separation of respondent unless and until proper procedures had been followed. But this is not to say that it would hold respondent to be entitled to full reinstatement with the attendant tension with her superiors that the agency intended to avoid by dismissing her. Congress has provided that a wrongfully dismissed employee shall receive full payment and benefits for any time during which the employee was wrongfully discharged from employment.[31] The Civil Service Commission could conceivably accommodate the conflicting claims in this case by directing respondent's superiors to provide her with an opportunity to reply by affidavit, and by ordering that she receive backpay for any period of her dismissal prior to the completion of the type of dismissal procedure required by the regulations.

The Court in *Scripps-Howard* recognized that certain forms of equitable relief could not properly be granted by federal courts. The Court specifically contrasted the stay of a license grant and the stay of a license denial, finding that the latter would have no effect:

> "Of course, no court can grant an applicant an authorization which the Commission has refused.

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[31] The Back Pay Act is found at 5 U. S. C. § 5596. The pertinent provisions read:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period . . . ."

> No order that the Court of Appeals could make would enable an applicant to go on the air when the Commission has denied him a license to do so. A stay of an order denying an application would in the nature of things stay nothing. It could not operate as an affirmative authorization of that which the Commission has refused to authorize." [32]

Surely that conclusion would not vary depending upon whether the radio station had started broadcasting on its own initiative and sought to stay a Commission order directing it to cease. Yet here the District Court did authorize, on an interim basis, relief which the Civil Service Commission had neither considered nor authorized—the mandatory reinstatement of respondent in her Government position. We are satisfied that *Scripps-Howard*, involving as it did the traditional authority of reviewing courts to grant stays, provides scant support for the injunction issued here.

The Court of Appeals also relied upon *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966), in reaching its decision. There a closely divided Court held that a Court of Appeals having ultimate jurisdiction to review orders of the Federal Trade Commission might, upon the Commission's application,[33] grant a

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[32] 316 U. S., at 14.

[33] A preliminary question of importance in *Dean Foods* was whether the Commission, in the absence of express statutory authorization, could petition the Court of Appeals for preliminary relief. This Court said:

"[T]he Commission is a governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental

temporary injunction to preserve the controversy before the agency. The Commission's application alleged,[34] and the court accepted,[35] that refusal to grant the injunction would result in the practical disappearance of one of the entities whose merger the Commission sought to challenge. The disappearance, in turn, would mean that the agency, and the court entrusted by statute with authority to review the agency's decision, would be incapable of implementing their statutory duties by fashioning effective relief. Thus invocation of the All Writs Act, as a preservative of jurisdiction, was considered appropriate.

Neither the reviewing jurisdiction of the Civil Service Commission nor that of the District Court would be similarly frustrated by a decision of the District Court remitting respondent to her administrative remedy. Certainly the Civil Service Commission will be able to weigh respondent's contentions and to order necessary relief without the aid of the District Court injunction. In direct contrast to the claim of the FTC in *Dean Foods* that its jurisdiction would be effectively defeated by

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power to ask the courts of appeals to exercise their authority derived from the All Writs Act." 384 U. S., at 606.

A contrary decision, the Court felt, would have made it virtually impossible for the Commission itself to undertake review of the proposed merger. The congressional grant of authority to the FTC in Clayton Act cases thus could have been frustrated.

[34] *Id.*, at 599–600. The complaint charged that one of the parties to the merger "'as an entity will no longer exist,'" *id.*, at 599, and that "consummation of the agreement would 'prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits.'" *Id.*, at 600. The Commission therefore was affirmatively asserting that the administrative remedy which it was authorized to fashion was inadequate.

[35] *Id.*, at 601.

denial of relief, the Commission here has argued that judicial action interferes with the normal agency processes.[36] And we see nothing in the record to suggest that any judicial review available under the doctrine of *Service* v. *Dulles* would be defeated in the same manner as review in *Dean Foods*.

We are therefore unpersuaded that the temporary injunction granted by the District Court in this case was justified either by our prior decisions dealing with the availability of injunctive relief to discharged federal employees, or by those dealing with the authority of reviewing courts to grant temporary stays or injunctions pending full appellate review. If the order of the District Court in this case is to be upheld, the authority must be found elsewhere.

III

This Court observed in *Scripps-Howard* that "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage," 316 U. S., at 11, and this observation carries particular force when a statutory scheme grants broad regulatory latitude to an administrative agency. In *Scripps-Howard* a careful review of the relevant statutory provisions and legislative history persuaded this Court that Congress had not intended to nullify the power of an appellate court,[37] having assumed jurisdiction after an agency decision, to issue stays in aid of its jurisdiction. The Court noted, in

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[36] In *Dean Foods* the Commission confessed its inability to fashion effective administrative relief. But petitioners here admit no such thing. Rather they strongly assert that the Back Pay Act, n. 31, *supra*, provides a complete remedy for any procedural irregularities which may have occurred in this case.

[37] 316 U. S., at 11–13.

particular, that stays were allowed in other cases processed through the FCC [38] and that the Court of Appeals had routinely issued stays in similar cases before undertaking an unexpected shift in policy.[39] But, at the other end of the spectrum, in *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), this Court held that a specific congressional grant of power to the ICC to suspend proposed rate modifications precluded the District Court from extending the suspension by temporary injunction. This was true despite arguments that district courts traditionally had such power and that Congress did not explicitly revoke the power by statute.[40] The Court there said:

> "The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be

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[38] The Court compared the provisions of §§ 402 (a) and 402 (b) of the Communications Act of 1934, 48 Stat. 1064. The former section specifically authorized temporary stays, through application of the Urgent Deficiencies Appropriation Act of Oct. 22, 1913, 38 Stat. 208, of orders of the Federal Communications Commission which were under review—with certain exceptions. Those exceptions, which included the order there at issue, were treated under § 402 (b) which made no specific provision for such stays. The Court thus was required to consider whether Congress deliberately sought to deprive courts of a power in those cases not governed by the Urgent Deficiencies Act which had been expressly authorized for those cases which were governed by the Act.

[39] See n. 24, *supra*.

[40] Although acknowledging that the legislative history did not clearly establish "a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates," the Court concluded: "[W]e cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head." 372 U. S., at 664.

> out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction." [41]

The overall scheme governing employees of the Federal Government falls neatly within neither of these precedents. Unlike *Scripps-Howard,* traditional stay practice lends little support to the sort of relief which the District Court granted respondent here, and the precedents dealing with the availability of equitable relief to discharged Government employees are quite unfavorable to respondent. Unlike *Arrow Transportation, supra,* the administrative structure is far more a creature of agency regulations than of statute. We are thus not prepared to conclude that Congress in this class of cases has wholly divested the district courts of their customary authority to grant temporary injunctive relief, and to that extent we agree with the Court of Appeals. But merely because the factors relied upon by the Government do not establish that the district courts are wholly bereft of the authority claimed for them here does not mean, as the Court of Appeals appeared to believe, that temporary injunctive relief in this class of cases is to be dispensed without regard to those factors. While considerations similar to those found sufficient in *Arrow Transportation* to totally deprive the district courts of equitable authority do not have that force here, they nonetheless are entitled to great weight in the equitable balancing process which attends the grant of injunctive relief.

We are dealing in this case not with a permanent Government employee, a class for which Congress has specified certain substantive and procedural protections,[42] but with a probationary employee, a class which Con-

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[41] *Id.,* at 668. (Emphasis in original.)

[42] See 5 U. S. C. § 7501.

gress has specifically recognized as entitled to less comprehensive procedures. Title 5 U. S. C. § 3321, derived from the original Pendleton Act,[43] requires the creation of this classification:

> "The President may prescribe rules, which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute."

It is also clear from other provisions in the Civil Service statutory framework that Congress expected probationary employees to have fewer procedural rights than permanent employees in the competitive service. For example, preference eligibles,[44] commonly veterans, are entitled to hearing procedures extended to persons in the competitive service *only after they have completed* "a probationary or trial period." [45] Persons suspended for national security reasons are given expanded protection *provided they have completed a trial or probationary period.*[46]

The Civil Service regulations are consistent with these statutes. These regulations are promulgated by the Civil Service Commission as authorized by Congress in

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[43] 22 Stat. 404.

[44] See 5 U. S. C. § 2108 (3).

[45] 5 U. S. C. §§ 7511–7512. Section 7511 defines a "preference eligible employee" as "a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia . . . ," subject to certain exceptions. Section 7512 provides that such an employee must receive written notice of the reasons for proposed adverse action, a chance to reply in writing and by affidavit, and notice of an adverse decision. A probationary employee, under the regulations, has more limited rights. See 5 CFR § 315.801 *et seq.*

[46] 5 U. S. C. § 7532 (c) (2).

5 U. S. C. §§ 1301–1302.[47] Part 752, the regulations governing adverse agency actions, provides certain procedural safeguards for employees but, as did the statutes cited above, exempts "employee[s] currently serving a probationary or trial period." [48] Such employees are remitted to the procedures specified in subpart H of Part 315,[49] the procedures at issue here. Under § 752.202 of the regulations permanent competitive service employees are to be retained in an active-duty status only during the required 30-day-notice period, and the Commission is given no authority to issue additional stays.[50] It cannot prevent the dismissal of an employee or order his reinstatement prior to hearing and determining his appeal on the merits. Reasonably, a probationary employee could be entitled to no more than retention on active duty for the period preceding the effective date of his discharge.

Congress has also provided a broad remedy for cases of improper suspension or dismissal. The Back Pay Act of 1948 [51] supplemented the basic Lloyd-LaFollette Act

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[47] Title 5 U. S. C. § 3301 *et seq.* grants to the President authority to promulgate rules and regulations governing the Civil Service. Title 5 U. S. C. § 1301 provides that "[t]he Civil Service Commission shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service." Title 5 U. S. C. § 1302 empowers the Commission to prescribe regulations, "subject to the rules prescribed by the President . . . ."

[48] 5 CFR § 752.103 (a)(5).

[49] 5 CFR § 315.801 *et seq.*

[50] Title 5 CFR § 752.202 (d) reads in part:

"Except as provided in paragraph (e) of this section, an employee against whom adverse action is proposed is entitled to be retained in an active duty status during the notice period."

Section 752.202 (a)(1) provides that "at least 30 full days' advance written notice" is required.

[51] See n. 31, *supra*.

of 1912 and provided that any person in the competitive Civil Service who was unjustifiably discharged and later restored to his position was entitled to full backpay for the time he was out of work. The benefits of this Act were extended to additional employees, including probationary employees, in 1966.[52] Respondent was eligible for full compensation for any period of improper discharge under this section.

As we have noted, respondent's only substantive claim, either before the District Court or in her administrative appeal, was that petitioners had violated the regulations promulgated by the Civil Service Commission. Those same regulations provided for an appeal to the agency which promulgated the regulations and further provided that until that appeal had been heard on the merits, the employer's discharge of the employee was to remain in effect. Respondent, however, sought judicial intervention before fully utilizing the administrative scheme.

The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded here was likely to have on the administrative process. When we couple with this consideration the historical denial of all equitable relief by the federal courts in cases such as *White* v. *Berry,* 171 U. S. 366 (1898), the well-established rule that the Government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs," *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 896 (1961), and the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or of the employee, 5A A. Corbin, Contracts § 1204 (1964), we think that the Court of Appeals was quite wrong in routinely applying to this case the traditional

[52] 80 Stat. 94, 95.

standards governing more orthodox "stays." See *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921 (1958).[53] Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that respondent at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases. We now turn to the showing made to the District Court on that issue, and to the Court of Appeals' treatment of it.

IV

The Court of Appeals said in its opinion:

> "Without passing on the merits of Mrs. Murray's contention that she will suffer irreparable harm if the sought-for-relief is not granted (a task for the District Court here), we note that there was a determination that such a loss of employment could be 'irreparable harm' in Reeber v. Rossell (1950), a case quite similar to that at bar. We agree with the *Reeber* court that such a loss of employment *can* amount to irreparable harm, and that injunctive relief *may* be a proper remedy pending the final administrative determination of the validity of the discharge by the Civil Service Commission." [54]

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[53] These considerations were set forth by the majority below as follows:

"(1) Has the petitioner made a strong showing that he is likely to prevail on the merits of his appeal? (2) Has the petitioner shown that without such relief he will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest?" 149 U. S. App. D. C., at 263, 462 F. 2d, at 878.

[54] *Id.*, at 262, 462 F. 2d, at 877 (emphasis in original).

At another point in its opinion, the Court of Appeals said:

> "As the District Court here felt that the hearing on the motion for the preliminary injunction could not be completed until Mr. Sanders was produced to testify, it was proper for him to continue the stay, in order to preserve the *status quo* pending the completion of the hearing." [55]

The court in its supplemental opinion filed after the Government's petition for rehearing further expanded its view of this aspect of the case:

> "The court's opinion does not hold, and the trial judge has not yet held, that interim relief *is proper* in Mrs. Murray's case, but we do hold that the trial judge may consider granting such relief, as this is inherent in his historical equitable role." [56]

In form the order entered by the District Court now before us is a continuation of the temporary restraining order originally issued by that court.[57] It is clear from the Court of Appeals' opinion that that court so construed it. But since the order finally settled upon by the District Court was in no way limited in time, the provisions of Fed. Rule Civ. Proc. 65 come into play. That Rule states, in part:

> "(b) A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before

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[55] *Id.*, at 265, 462 F. 2d, at 880.

[56] *Id.*, at 270, 462 F. 2d, at 885 (emphasis in original).

[57] See n. 8, *supra*.

> the adverse party or his attorney can be heard in opposition . . . . Every temporary restraining order granted without notice . . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

The Court of Appeals whose judgment we are reviewing has held that a temporary restraining order continued beyond the time permissible under Rule 65 must be treated as a preliminary injunction, and must conform to the standards applicable to preliminary injunctions. *National Mediation Board* v. *Airline Pilots Assn.*, 116 U. S. App. D. C. 300, 323 F. 2d 305 (1963). We believe that this analysis is correct, at least in the type of situation presented here, and comports with general principles imposing strict limitations on the scope of temporary restraining orders.[58] A dis-

[58] The Court of Appeals for the Second Circuit, in an opinion cited by the Court of Appeals for the District of Columbia Circuit in *National Mediation Board* v. *Airline Pilots Assn.*, 116 U. S. App. D. C. 300, 323 F. 2d 305 (1963), described these principles as follows:

"It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65 (b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.

"It is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the

trict court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. Therefore we

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final judgment rule to permit review of preliminary injunctions. 28 U. S. C. § 1292 (a)(1). To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued *without* a preliminary adjudication of the basic rights involved, would completely defeat the purpose of this provision.

"We hold, therefore, that the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of 28 U. S. C. § 1292 (a)(1)." *Pan American World Airways* v. *Flight Engineers' Assn.*, 306 F. 2d 840, 843 (1962). (Citations omitted; emphasis in original.)

Our Brother MARSHALL, in his dissenting opinion, nevertheless suggests that a district court can totally or partially impede review of an indefinite injunctive order by failing to make any findings of fact or conclusions of law. It would seem to be a consequence of this reasoning that an order which neglects to comply with one rule may be saved from the normal appellate review by its failure to comply with still another rule. We do not find this logic convincing. Admittedly, the District Court did not comply with Fed. Rule Civ. Proc. 52 (a), but we do not think that we are thereby foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supports the issuance of injunctive relief. As discussed below, nothing in the pleadings or affidavits, or in the testimony at the hearing before the District Court, demonstrates that this is an extraordinary case supporting the award of judicial relief. See n. 68, *infra*.

view the order at issue here as a preliminary injunction.

We believe that the Court of Appeals was quite wrong in suggesting that at this stage of the proceeding the District Court need not have concluded that there was actually irreparable injury.[59] This Court has stated that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies," *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 506–507 (1959), and the Court of Appeals itself in *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921 (1958), has recognized as much. Yet the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations relevant to irreparable injury.[60] We are therefore somewhat puzzled

[59] We note that Rule 65 requires a showing of irreparable injury for the issuance of a temporary restraining order as well. Therefore, for the purposes of this part of the discussion, it would make no difference that the order was styled a temporary restraining order, rather than a preliminary injunction.

[60] The affidavit in its entirety states:

"JEANNE M. MURRAY, being first duly sworn, deposes as follows:

"1. I am presently employed by the Public Buildings Service of the General Services Administration (GSA) as a Program Analyst, GS–13.

"2. On May 20, 1971, at approximately five p. m., I was given a letter signed by Mr. W. H. Sanders, Acting Commissioner of the Public Buildings Service, informing me that my employment was to be terminated as of Saturday, May 29, 1971.

"3. I have never been told that GSA's Personnel files contain adverse information about my service in the Defense Intelligence Agency (DIA), nor have I ever seen a memorandum dealing with my employment there.

"4. I worked for slightly over a year at the DIA, and I have been

about the basis for the District Court's conclusion that respondent "may suffer immediate and irreparable injury." The Government has not specifically urged this procedural issue here, however, and the Court of Appeals in its opinion discussed the elements upon which it held that the District Court might base a conclusion of irreparable injury. Respondent's unverified complaint alleged that she might be deprived of her income for an indefinite period of time, that spurious and unrebutted charges against her might remain on the record, and that she would suffer the embarrassment of being wrongfully discharged in the presence of her coworkers.[61] The Court of Appeals intimated that either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury and provide a basis for temporary injunctive relief.[62] We disagree.[63]

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informed by the Acting Chief of Staff of the DIA, Rear Admiral D. E. Bergin, that my personnel file at DIA contains nothing derogatory to me.

"5. In recent weeks, I was informed by Mr. William Mulroney, a DIA employee, that someone from GSA had been making inquiries of DIA personnel about my term of service there."

[61] Complaint, par. 12.

[62] 149 U. S. App. D. C., at 262, 462 F. 2d, at 877.

[63] The Court of Appeals held that the Government's failure to produce witness Sanders, after the District Court chose to hear him orally, rather than to rely on his affidavit, allowed the District Court to continue the temporary restraining order until Sanders appeared. We have no doubt that a district court in appropriate circumstances may be justified in resolving against a party refusing to produce a witness under his control the relevant issues upon which that witness' testimony might have touched. But it is clear from the record that the testimony of the witness Sanders was desired to test the basis upon which respondent was discharged, testimony which, of course, would go to the issue of respondent's ultimate chances for success on the merits. While the District Court may

Even under the traditional standards of *Virginia Petroleum Jobbers, supra,* it seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.[64] In that case the court stated:

> "The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." [65]

This premise is fortified by the Back Pay Act discussed above.[66] This Act not only affords monetary relief which will prevent the loss of earnings on a periodic basis from being "irreparable injury" in this type of case, but

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well have been entitled to resolve *that* issue against the Government at that stage of the proceeding, this conclusion in no way dispenses with the necessity for a conclusion that irreparable injury will occur, since that is a separate issue that must be proved to the satisfaction of the Court by the person seeking equitable relief.

[64] It should be noted that *Virginia Petroleum Jobbers* dealt with a fact situation quite dissimilar to this one. There the Federal Power Commission had denied petitioner leave to intervene in proceedings before the Commission. In conjunction with appeal of that decision the petitioner had filed a "motion for a stay of further proceedings pending completion of [the Court's] review of the Commission's orders denying intervention or rehearing." 104 U. S. App. D. C., at 109, 259 F. 2d, at 924. Such a fact situation was far closer to the traditional situation in which equity powers have been employed to grant a stay pending appeal than is the situation involved in the instant case.

[65] *Id.,* at 110, 259 F. 2d, at 925 (emphasis in original).

[66] N. 31, *supra.*

its legislative history suggests that Congress contemplated that it would be the usual, if not the exclusive, remedy for wrongful discharge. The manager of the bill on the floor of the Senate, Senator Langer, commented on the bill at the time of its passage:

> "[It] . . . provides that an agency or department of the Government may remove any employee at any time, but that the employee shall then have a right of appeal. When he is removed, he is of course off the pay roll. If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended." [67]

Respondent's complaint also alleges, as a basis for relief, the humiliation and damage to her reputation which may ensue. As a matter of first impression it would seem that no significant loss of reputation would be inflicted by procedural irregularities in effectuating respondent's discharge, and that whatever damage might occur would be fully corrected by an administrative determination requiring the agency to conform to the applicable regulations. Respondent's claim here is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge.

Assuming for the purpose of discussion that respondent had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the

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[67] 94 Cong. Rec. 6681 (1948).

issuance of a temporary injunction in this type of case.[68] We therefore reverse the decision of the Court of Appeals which approved the action of the District Court.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I think with all respect that while the narrow isolated issue involved in this litigation is exposed in the opinion of the Court the nature of the problem is not.

Respondent, a probationary employee, claims that her discharge was not based exclusively on her work as a probationary employee. If it were based on her work as a probationary employee, the procedure is quite summary and her right of appeal to the Civil Service Commission is limited to only a few grounds such as discrimination based on race, color, religion, sex, or national origin, 5 CFR § 315.806. But her claim is that her discharge was based, at least in part, on conduct prior to her federal employment. In case that prior conduct is the basis of the discharge, the employee is entitled to advance notice of proposed termination, an oppor-

[68] We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are hard to define in advance of their occurrence. We have held that an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however severely they may affect a particular individual. But we do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case. See also *Wettre* v. *Hague*, 74 F. Supp. 396 (Mass. 1947); vacated and remanded on other grounds, 168 F. 2d 825 (CA1 1948).

tunity to respond in writing with supporting affidavits, and notice of any adverse decisions on or prior to the effective date of the termination, 5 CFR § 315.805.

The Congress in 1966 provided that all wrongfully discharged federal employees, including probationary employees are entitled to backpay, 5 U. S. C. § 5596, and the Court concludes that that is the employee's exclusive remedy.

But where an agency has terminated employment and the employee appeals to the Civil Service Commission, the Commission has no power to issue a stay of the agency's action. This is, therefore, not a case where the employee has gone to the courts for relief which the Commission could have granted but refused to do so. Nor is respondent challenging the Civil Service law; nor is she asking for a ruling on the merits of her claim; nor did the District Court, whose judgment was affirmed by the Court of Appeals, act in derogation of the administrative process. Rather, it protected that process by staying the discharge until the Commission had ruled on the appeal.

The power to issue a stay is inherent in judicial power and as indicated by the Court rests on the exercise of an informed discretion on a showing of irreparable injury to the applicant or to the public interest, *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4, 14. That doctrine is not limited, as the Department of Justice suggests, to issuance of stays by a court only after an appeal has been taken. We held in *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 603–604, that the All Writs Act, 28 U. S. C. § 1651, which empowers federal courts to " 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,' " extends to "potential jurisdiction of the appellate court where an

appeal is not then pending but may be later perfected." The District Court has at least a limited review of the Commission, *Norton* v. *Macy*, 135 U. S. App. D. C. 214, 217, 417 F. 2d 1161, 1164; *Dozier* v. *United States*, 473 F. 2d 866. Hence the All Writs Act justified its power to grant a stay.

We have, therefore, a case where a stay supplements and does not curtail administrative power, the Commission having no authority to grant that relief. The District Court power preserves the status quo, does not pass on the merits of the controversy, and limits its stay to the date when the merits of the discharge are adjudicated by the Commission. I agree with the Court that that order was appealable.

A point is made that respondent has not shown irreparable injury. That misstates the issue. The Distric Court issued a stay pending a hearing on whether a temporary injunction should issue. The hearing, if held, would encompass two issues: (1) whether the grounds for respondent's discharge antedated her present employment (see 149 U. S. App. D. C. 256, 269, 462 F. 2d 871, 884) and were not restricted to her record as a probationary employee; [1] and (2) whether she would suffer irreparable injury. As stated by the Court of Appeals, respondent "may show . . . irreparable damage, if the hearing before Judge Gasch is allowed to proceed to a decision." *Id.*, at 269, 462 F. 2d, at 884. The stay was issued by the District Court only because the federal

[1] Where, as here, conduct prior to appointment as a probationary employee as well as conduct during the period of employment is alleged to be the basis of the discharge, the requirements of procedural due process are obvious. We said in *Wieman* v. *Updegraff*, 344 U. S. 183, 192, "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." And see *Schwartz* v. *Covington*, 341 F. 2d 537, 538.

agency involved refused to produce as a witness the officer who had decided to discharge respondent. Both the District Court and the Court of Appeals were alert to the necessity to show irreparable injury before an injunction issues.

On that issue there is more than meets the eye.

Employability is the greatest asset most people have. Once there is a discharge from a prestigious federal agency, dismissal may be a badge that bars the employee from other federal employment. The shadow of that discharge is cast over the area where private employment may be available. And the harm is not eliminated by the possibility of reinstatement, for in many cases the ultimate absolution never catches up with the stigma of the accusation. Thus the court in *Schwartz* v. *Covington,* 341 F. 2d 537, 538, issued a stay upon a finding of irreparable injury where a serviceman was to be discharged for alleged homosexual activity: "[A]ppellee has shown that he will suffer irreparable damage if the stay is not granted. Irrespective of the government's recent assurance that the appellee would be reinstated if he prevails upon review of his discharge, the injury and the stigma attached to an undesirable discharge are clear." Unlike a layoff or discharge due to fortuitous circumstances such as the so-called energy crisis, a discharge on the basis of an employee's lifetime record or on the basis of captious or discriminatory attitudes of a superior may be a cross to carry the rest of an employee's life. And we cannot denigrate the importance of one's social standing or the status of social stigma as legally recognized harm. In *Ah Kow* v. *Nuan,* 5 Sawy. 552, the Circuit Court, speaking through Mr. Justice Field, held that a Chinese prisoner could recover damages from the sheriff who cut off his queue, the injury causing great mental anguish, disgrace

in the eyes of friends and relatives, and ostracism from association with members of his own race.

There is no frontier where the employee may go to get a new start. We live today in a society that is closely monitored. All of our important acts, our setbacks, the accusations made against us go into data banks and are instantly retrievable by the computer.[2] An arrest goes into the data bank even though it turns out to be unconstitutional or based on mistaken identity. There is no federal procedure for erasing arrests. While they arise in 50 States as well as in the federal area, only a few States have procedures for erasing them; and that entails a long and laborious procedure.[3] More-

[2] With dossiers being compiled by commercial credit bureaus, state and local law enforcement agencies, the CIA, the FBI, the IRS, the Armed Services, and the Census Bureau, we live in an Orwellian age in which the computer has become "the heart of a surveillance system that will turn society into a transparent world." Miller, Computers, Data Banks and Individual Privacy: An Overview, 4 Col. Human Rights L. Rev. 1, 2 (1972). Although the subject of congressional concern, the problem is one which has thus far avoided legislative correction. See Federal Data Banks, Computers and the Bill of Rights, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). See also A. Miller, The Assault on Privacy (1971).

[3] Illinois provides that photographs, fingerprints, etc., be returned to unconvicted arrestees upon acquittal or release and further provides that the arrestee may petition a local court to have the record expunged by the arresting authorities. There is, however, no method for retrieving records which have been distributed to other law enforcement authorities or to private individuals. Ill. Rev. Stat., c. 38, § 206–5 (1973). Connecticut has a statute with similar shortcomings. Conn. Gen. Stat. Ann. § 54–90 (Supp. 1971); see Satter & Kalom, False Arrest: Compensation and Deterrence, 43 Conn. B. J. 598, 612–613. New York's former Penal Law provided that all fingerprints, photographs, etc., of those acquitted of criminal charges had to be returned to the individual *if* no other criminal proceedings were pending against the individual and he had no prior convictions. N. Y. Penal Law § 516 (1909).

over, this generation grew up in the age where millions of people were screened for "loyalty" and "security"; and many were discharged from the federal service; many resigned rather than face the ordeal of the "witch hunt" that was laid upon them. Discharge from the federal service or resignation under fire became telltale signs of undesirability. Therefore, the case of irreparable injury for an unexplained discharge from federal employment may be plain enough on a hearing.

The District Court and the Court of Appeals were well within the limits of the law in granting a stay so that the issue of irreparable injury might be determined. It hardly comports with any standard for the expenditure of judicial energies to spend our time trying to find error in the exercise of the lower court's discretion to protect federal employees by giving them at least a chance to prove irreparable injury.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN concurs, dissenting.

In my view no appealable order has been entered in this case, and both the Court of Appeals and this Court accordingly lack jurisdiction.

The orders issued by the District Court are both temporary restraining orders. The first, issued on May 28 and captioned "Temporary Restraining Order," enjoined Mrs. Murray's dismissal until the determination of her application for an injunction. The second, issued on June 4 and also captioned "Temporary Restraining Order," provides "that the Temporary Restraining Order issued by this Court at twelve o'clock p. m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders." At no time did the District Court indicate it was issuing anything but a temporary restraining order. During the hearing on the application for a preliminary injunction, after the court indicated

it wanted to hear from Mr. Sanders in person, the Government informed the court that Mr. Sanders was then out of town on vacation. The court replied: "Let me know when he can be available." Counsel for the Government responded: "Very well." And the District Court then said: "The T. R. O. will be continued until he shows up. . . . Tell the agency I will continue the temporary restraining order until the witness appears." Tr. 10.

It is well settled that the grant or denial of a temporary restraining order is not appealable, except in extraordinary circumstances, not present here, where the denial of the temporary restraining order actually decides the merits of the case or is equivalent to a dismissal of the suit. See generally 11 C. Wright & A. Miller, Federal Practice & Procedure § 2962, pp. 616–617 (1973), and cases there cited.

The Court holds, however, that since the temporary restraining order was extended by the District Court beyond the time limitation imposed by Fed. Rule Civ. Proc. 65 (b), it became an appealable preliminary injunction. I cannot agree. Federal Rule Civ. Proc. 52 (a) expressly provides that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." This Rule applies to preliminary injunctions, and as no findings of fact and conclusions of law have yet been filed in this case, no valid preliminary injunction was ever issued. See *National Mediation Board* v. *Air Line Pilots Assn.*, 116 U. S. App. D. C. 300, 323 F. 2d 305 (1963); *Sims* v. *Greene*, 160 F. 2d 512 (CA3 1947).

Nor would it make sense for this Court to review the District Court's order in this case as the grant of a preliminary injunction. Where the District Court has not entered findings of fact and conclusions of law under

Rule 52 (a), meaningful review is well-nigh impossible. "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52 (a) of the Rules of Civil Procedure." *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940).

It is suggested that if an indefinitely extended temporary restraining order remained unappealable, the District Court would have virtually unlimited authority over the parties in an injunctive action. At the outset, this cannot justify this Court's reaching the merits of Mrs. Murray's claim for a preliminary injunction. Even if the order entered by the District Court is appealable, it should be appealable only for the purposes of holding it invalid for failure to comply with Rule 52 (a). This was the precise course taken by the Court of Appeals for the District of Columbia Circuit in *National Mediation Board, supra,* on which the majority relies. See also *Sims* v. *Greene, supra.*

In addition, the Government had other courses it could have taken in this case. In view of the District Court's error in granting a restraining order of unlimited duration without complying with the requirements for a preliminary injunction, the Government could have moved the District Court to dissolve its order indefinitely continuing the temporary restraining order. Rule 65 (b) expressly provides for such a motion.[1] Had the Government followed this course, the District Court could have

[1] "On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." Fed. Rule Civ. Proc. 65 (b).

corrected its error and gone on to resolve the issues presented by the application for a preliminary injunction. The end result would have been the grant or denial of a preliminary injunction, with findings of fact and conclusions of law, which we could meaningfully review.

Here, instead, we find the Supreme Court determining that although the District Court had jurisdiction to grant injunctive relief, the equities of Mrs. Murray's case did not support a preliminary injunction, when neither the District Court nor the Court of Appeals has yet confronted the latter issue.[2] I do not believe this makes for sound law.

Since the majority persists in considering the merits of Mrs. Murray's claim for injunctive relief, some additional comment is in order. I agree with the majority's conclusion that Congress did not divest federal courts of their long-exercised authority to issue temporary injunctive relief pending the exhaustion of both administrative and judicial review of an employee's claim of wrongful dismissal. I cannot accept, however, the way in which the majority opinion then proceeds to take away with the left hand what it has just given with the right, by precluding injunctive relief in all but so-called "extraordinary cases," whatever they may be.

At the outset, I see no basis for applying any different standards for granting equitable relief in the context of a discharged probationary employee than the long-recognized principles of equity applied in all other situations. See *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921 (1958). Indeed, it appears that the factors which the

[2] The Court of Appeals expressly stated that it was not evaluating Mrs. Murray's claim of irreparable injury because "any such finding . . . is for the trial judge, who has not yet [decided (and may never decide)] this point in favor of Mrs. Murray." 149 U. S. App. D. C. 256, 262 n. 21, 462 F. 2d 871, 877 n. 21 (1972).

majority would have courts weigh before granting injunctive relief are all encompassed within the traditional formulations. The adequacy of backpay as a remedy, for example, is relevant in determining whether the party seeking relief has shown that "without such relief, it will be irreparably injured." *Id.*, at 110, 259 F. 2d, at 925. Likewise, the possible disruptive effect which temporary injunctive relief might have on the office where respondent was employed or on the administrative review process itself relates to whether "the issuance of a stay [will] substantially harm other parties interested in the proceedings." *Ibid.*

However one articulates the standards for granting temporary injunctive relief, I take it to be well settled that a prerequisite for such relief is a demonstrated likelihood of irreparable injury for which there is no adequate legal remedy. But I cannot accept the majority's apparent holding, buried deep in a footnote, that because of the Back Pay Act, a temporary loss in income can never support a finding of irreparable injury, no matter how severely it may affect a particular individual. See *ante*, at 92 n. 68. Many employees may lack substantial savings, and a loss of income for more than a few weeks' time might seriously impair their ability to provide themselves with the essentials of life—*e. g.*, to buy food, meet mortgage or rent payments, or procure medical services. Cf. *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970). Government employees might have skills not readily marketable outside the Government, making it difficult for them to find temporary employment elsewhere to tide themselves over until the lawfulness of their dismissal is finally determined. In some instances, the likelihood of finding alternative employment may be further reduced by the presence on the employee's records of the very dismissal at issue. Moreover, few employers will be willing to hire and train a new employee knowing

he will return to his former Government position if his appeal is successful. Finally, the loss of income may be "temporary" in only the broadest sense of that word. Not infrequently, dismissed federal employees must wait several years before the wrongful nature of their dismissal is finally settled and their right to backpay established. See, *e. g.*, *Paroczay* v. *United States*, 177 Ct. Cl. 754, 369 F. 2d 720 (1966); *Paterson* v. *United States*, 162 Ct. Cl. 675, 319 F. 2d 882 (1963).

The availability of a backpay award several years after a dismissal is scant justice for a Government employee who may have long since been evicted from his home and found himself forced to resort to public assistance in order to support his family. And it is little solace to those who are so injured to be told that their plight is "normal" and "routine." Whether common or not, such consequences amount to irreparable injury which a court of equity has power to prevent.

Nor can I agree with the majority's analysis of Mrs. Murray's claim of damaged reputation. It is argued that Mrs. Murray can suffer no significant loss of reputation by procedural irregularities in effectuating her discharge because her claim is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge. *Ante*, at 91. In my view, this analysis not only reflects a total misunderstanding of the gist of Mrs. Murray's complaint, but also fails to comprehend the purposes behind the Civil Service Commission regulations at issue here.

The Commission provides a special pretermination procedure where a probationary employee is to be terminated "for conditions arising before appointment," not as an empty gesture, but rather because the employing agency might be mistaken about these preappointment conditions, and might decide not to dismiss the employee

if he is given an opportunity to present his side of the story. Mrs. Murray does not seek a hearing as an end in itself, but rather to correct what she believes is a mistaken impression the agency had about her conduct in her prior job, in the hope that with the record straight, the agency would not discharge her. She seeks to save her job and to avoid the blot on her employment record that a dismissal entails, and it is in this sense that she claims her dismissal would injure her reputation.

Whether the likelihood of irreparable injury to Mrs. Murray if she is not allowed to retain her job pending her administrative appeal, when balanced against the Government's interests in having her out of the office during this period, supports equitable relief in the present case is a question I would leave for the District Court. Because of Mr. Sanders' absence, the District Court cut short its hearing on the application for a preliminary injunction before either the Government or Mrs. Murray had an opportunity to present witnesses or other evidence. Mrs. Murray still has not had her day in court to present evidence supporting her allegation of irreparable injury, and what that evidence would be were she given that opportunity we can only speculate.

WINDWARD SHIPPING (LONDON) LTD. ET AL. *v.* AMERICAN RADIO ASSOCIATION, AFL–CIO, ET AL.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, FOURTEENTH SUPREME JUDICIAL DISTRICT

No. 72–1061. Argued December 3–4, 1973—
Decided February 19, 1974

Petitioners, foreign-flag shipowners and agents, sought injunctive relief in the Texas state courts to bar, as tortious under Texas law, the picketing of their vessels by respondent unions, which were protesting as substandard the wages paid to the foreign crewmen, who manned the vessels. The trial court sustained respondents' contention that state-court jurisdiction was pre-empted by the Labor Management Relations Act (LMRA), and the appellate court affirmed. *Held:* Respondents' activities, which did not involve wages paid within this country but were designed to force the foreign vessels to raise their operating costs to levels comparable to those of American shippers, would have materially affected the foreign ships' "maritime operations" and precipitated responses by the foreign shipowners in the field of international relations transcending the domestic wage-cost decision that the LMRA was designed to regulate. Respondents' picketing was consequently not activity "affecting commerce" as defined in §§ 2 (6) and (7) of the National Labor Relations Act, as amended by the LMRA, and the Texas courts erred in holding that they were prevented by the LMRA from entertaining petitioners' injunction suit. *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138, followed; *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195, distinguished. Pp. 109–116.

482 S. W. 2d 675, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, STEWART, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 116.

Robert S. Ogden, Jr., argued the cause for petitioners. With him on the briefs were *James V. Hayes* and *Joseph E. Fortenberry*.

Howard Schulman argued the cause for respondents. With him on the brief was *W. Arthur Combs*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners are the owners and managing agents of two ships which are registered under the laws of Liberia and fly the Liberian flag. They sought injunctive relief in the state courts in Texas to bar picketing of their vessels by respondent unions. The trial court denied relief, finding that the dispute was "arguably" within the jurisdiction of the National Labor Relations Board and that the jurisdiction of the state courts was therefore pre-empted. The Texas Court of Civil Appeals affirmed,[1] and we granted certiorari, 412 U. S. 927 (1973), to consider whether the activities here complained of were activities "affecting commerce" within the meaning of §§ 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 450, 29 U. S. C. §§ 152 (6) and (7).[2] We hold that they were

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Bork* and *Allan A. Tuttle* for the United States; by *Frank L. Wiswall, Jr.*, for the Republic of Liberia; by *Bryan F. Williams, Jr.*, for the West Gulf Maritime Assn., Inc.; and by *Frank McRight* for the Mobile Steamship Assn.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

[1] 482 S. W. 2d 675 (1972).

[2] The definitions in §§ 2 (6) and (7), 29 U. S. C. §§ 152 (6) and (7), as amended by the Labor Management Relations Act, 1947, are as follows:

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United

not, and therefore reverse the judgment of the Court of Civil Appeals.

I

The vessels *Northwind* and *Theomana* are ships of Liberian registry, carrying cargo between foreign ports and the United States. *Northwind* is owned by petitioner Westwind Africa Line, Ltd., a Liberian corporation, while *Theomana* is owned by petitioner SPS Bulkcarriers Corp., a Liberian corporation, and managed by petitioner Windward Shipping (London) Ltd., a British corporation. The crews of both vessels are composed entirely of foreign nationals, represented by foreign unions and employed under foreign articles of agreement.

Respondents are American maritime unions, apparently representing a substantial majority of American merchant seamen.[3] Alarmed by an accelerating decline in the number of jobs available to their members, these unions agreed to undertake collective action against foreign vessels, which they saw as the major cause of their business recession. Specifically, these unions agreed to picket foreign ships, calling attention to the competitive advantage enjoyed by such vessels because of a difference

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States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

[3] Respondents describe themselves in their brief as "six labor organizations who collectively represent the overwhelming majority and practically almost all American merchant seamen." Brief for Respondents 2.

between foreign and domestic seamen's wages. All parties concede that such a difference does exist.[4]

The picketing here occurred at the Port of Houston, Texas, in October 1971. Both *Northwind* and *Theomana* were docked within the port, and respondents established picket lines in front of each vessel. There were four pickets assigned to each vessel, carrying signs which read:

"ATTENTION TO THE PUBLIC
THE WAGES AND BENEFITS PAID SEAMEN ABOARD THE VESSEL THEOMANA [NORTHWIND] ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN. THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE STANDARDS AND LOSS OF OUR JOBS. PLEASE DO NOT PATRONIZE THIS VESSEL. HELP THE AMERICAN SEAMEN. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL ON THIS SITE."
[Printed names of the six unions.]

These signs were supplemented by pamphlets of similar import.[5] The pickets were instructed not to

[4] The petitioners state:

"We do not contest the fact that the wages of foreign crews on foreign ships are substantially lower than those paid to American seamen on American ships." Brief for Petitioners 19.

The brief notes some estimates that the American wage costs are between 2½ to 4 times higher than the foreign wage costs. *Id.*, at 19 n.

[5] These pamphlets stated:

"To the Public—American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.

"American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.

"A strong American Merchant Marine is essential to our national

discuss the picketing with anyone, and they appear to have followed their instructions.

The picketing, although neither obstructive nor violent, was not without effect. Longshoremen and other port workers refused to cross the picket lines to load and unload petitioners' vessels. Petitioners filed separate suits in a Texas state court, asking the court to enjoin the picketing as tortious under Texas law. The primary basis for petitioners' claim was that the picketing sought to induce the owners and crews to break pre-existing contracts. Respondents presented several defenses, contending in particular that the jurisdiction of the Texas court was pre-empted by the National Labor Relations Act.[6]

The trial court sustained this contention, holding that jurisdiction properly lay with the NLRB, and the Texas Court of Civil Appeals affirmed. That court found that state jurisdiction was pre-empted by the Act when "the activities complained of are arguably either protected by section 7 or prohibited by section 8 of the NLRA as amended by the LMRA,"[7] see *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), and that the conduct here met that test. The court rejected petitioners' argument that the picketing interfered with the "maritime operations of foreign-flag

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defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.

"PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.

"Our dispute is limited to the vessel picketed at this site, the S. S. ———" (App. 21).

[6] The courts below considered only this ground advanced by respondents, finding it dispositive. We express no opinion on the merits of respondents' other contentions.

[7] 482 S. W. 2d, at 678.

ships," see *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963), in such manner as to remove it from the Board's jurisdiction.[8] The court concluded:

> "If [the picketing] but voices a complaint as to foreign wages and urges the public not to patronize foreign vessels it does not engage in matters outside of commerce. It is peaceful picketing, publicizing a labor dispute, of such a character that its validity is suggested by the Court's holding in the Marine Cooks case, supra. It is, at least arguably, a protected activity under section 7 of the LMRA. As such, it is an activity as to which the exclusive jurisdiction to determine its propriety has been preempted to the NLRB."[9]

Petitioners contend that the Court of Appeals too narrowly construed this Court's decisions denying the NLRB jurisdiction in cases involving foreign-flag ships. We therefore begin by examining the principles established by those decisions for determining the jurisdiction of the NLRB.

II

In a series of cases decided over the past 17 years,[10] this Court has discussed the application of the Labor Management Relations Act in situations which might be broadly described as disputes between unions representing workers in this country and owners of foreign-flag vessels operating in international maritime commerce. *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957), is the leading case on the subject. In *Benz*

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[8] *Id.*, at 680–682.

[9] *Id.*, at 682.

[10] *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957); *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963); *Incres S. S. Co.* v. *Maritime Workers*, 372 U. S. 24 (1963); *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195 (1970).

the question was whether the Labor Management Relations Act, 1947, precluded a diversity suit for damages brought in the United States District Court by foreign shipowners against picketing American unions. The picketing had been undertaken in Portland, Oregon, to support striking foreign crews employed under foreign articles and had resulted in the refusal of workers to load and repair the docked foreign ships. The District Court had awarded damages and the Court of Appeals affirmed.

This Court held that the shipowners' action was not pre-empted by the Labor Management Relations Act. Studying the legislative history of the Act, the Court found no indication that it was intended to govern disputes between foreign shipowners and foreign crews. On the contrary, the Court concluded that the most revealing legislative history strongly suggested the bill was a "bill of rights . . . for *American* workingmen and for their employers." *Id.*, at 144. (Emphasis in original.) The Court stated that this history "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." *Ibid.*

Recognition of the clear congressional purpose to apply the LMRA only to American workers and employers was doubtless a sufficient reason to place the picketing in *Benz* outside the Act. But the Court in that case made clear its reluctance to intrude domestic labor law willy-nilly into the complex of considerations affecting foreign trade, absent a clear congressional mandate to do so:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the

> possibilities of international discord are so evident and retaliative action so certain." *Id.*, at 147.

In the 17 years since *Benz* was decided, Congress has in no way indicated any such "affirmative intention," and this Court has continued to construe the LMRA in accordance with the dictates of that case.

The reasoning of *Benz* was reaffirmed in *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963), and *Incres S. S. Co.* v. *Maritime Workers*, 372 U. S. 24 (1963), decided together six years later. In *McCulloch*, we held that the National Labor Relations Board had improperly assumed jurisdiction under the Act to order an election involving foreign crews of foreign-flag ships. Rejecting the Board's "balancing of contacts" theory, the Court said:

> "[T]o follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports." 372 U. S., at 19.[11]

In *Incres* we applied this rationale to a situation involving union picketing of a foreign ship in an effort to organize the foreign crew. Reversing the holding of a New York state court that the picketing was arguably within the jurisdiction of the NLRB, the Court said:

> "The Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances 'affecting commerce,' and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2 (6), 29 U. S. C. § 152 (6)." 372 U. S., at 27.

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[11] The Court in *McCulloch* also noted that the Board's actions had "aroused vigorous protests from foreign governments and created international problems for our Government." 372 U. S., at 17.

But *Benz* and its successor cases have not been read to exempt all organizational activities from the Act's protections merely because those activities in some way were directed at an employer who was the owner of a foreign-flag vessel docked in an American port. In *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195 (1970), the Court held that the picketing of foreign ships to protest substandard wages paid by their owners to nonunion American longshoremen was "in 'commerce' within the meaning of § 2 (6), and thus might have been subject to the regulatory power of the National Labor Relations Board." *Id.*, at 200. The pickets in *Ariadne*, unlike the pickets in *Benz* or *Incres*, were primarily engaged in a dispute as to whether an employer should hire unionized or nonunionized American workers to perform longshoremen's work,[12] and the substandard wages which they were protesting were being paid to fellow American workers. The Court specifically noted: "[T]his dispute centered on the wages to be paid American residents." *Id.*, at 199.

The term "in commerce," as used in the LMRA, is obviously not self-defining, and certainly the activities in *Benz*, *McCulloch*, and *Incres*, held not covered by the Act, were literally just as much "in commerce" as were the activities held covered in *Ariadne*. Those cases which deny jurisdiction to the NLRB recognize that Congress, when it used the words "in commerce" in the LMRA, simply did not intend that Act to erase long-

[12] The evidence in *Ariadne* showed that the work at issue was performed partly by members of the foreign ships' crews and partly by outside labor. 397 U. S., at 196. Those workers included in the classification "outside labor" were nonunion members. This Court noted that "[t]he participation of some crew members in the longshore work does not obscure the fact that this dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work." *Id.*, at 199.

standing principles of comity and accommodation in international maritime trade. In *Lauritzen* v. *Larsen,* 345 U. S. 571, 577 (1953), the Court commented on the congressional intent with respect to the Jones Act of 1920 in these words:

> "But Congress in 1920 wrote these all-comprehending words, not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations." [13]

We are even more reluctant to attribute to Congress an intention to disrupt this comprehensive body of law by construction of an Act unrelated to maritime commerce and directed solely at American labor relations.

III

The picketing activities in this case do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres;* respondents seek

[13] The basic question at issue in *Lauritzen* was whether American or Danish law applied to a maritime tort which occurred in Havana Harbor. Although analysis of the Jones Act there obviously involved different considerations from analysis of the Labor Management Relations Act here, it is interesting to note that some arguments at least are common to both cases. In *Lauritzen* this Court rejected a "candid and brash appeal" made by the seamen and various *amici* that the Court should "extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own." 345 U. S., at 593. We observed at that time that such arguments were obviously better directed to Congress.

neither to organize the foreign crews for purpose of representation nor to support foreign crews in their own wage dispute with a foreign shipowner. But those cases do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable.

The picket signs utilized at the docks where the *Northwind* and *Theomana* were tied up protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States. At the very least, the pickets must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large-scale increase in operating costs would have more than a negligible impact on the "maritime operations" of these foreign ships, and the effect would be by no means limited to costs incurred while in American ports. Unlike *Ariadne,* the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country.

In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in

foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*.[14]

Since we hold that respondents' picketing was not "in commerce" as defined by the Act, we do not reach the question of whether the activity was otherwise of such a nature that state courts would be precluded by the LMRA from entertaining an action to enjoin it. Our conclusion that the activities here involved were not "in commerce" within the meaning of §§ 2 (6) and (7) of the NLRA, as amended by the LMRA, resolves a question which, of course, is one for the courts in the first instance. *Ariadne*, 397 U. S., at 200. The Court of Civil Appeals was therefore wrong in holding that the courts of the

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[14] We do not find the rationale of *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365 (1960), to be applicable here. Although that case involved a labor situation strikingly similar to the situation involved in this case, the controlling question in *Marine Cooks* was the jurisdiction of a federal district court to enjoin picketing of a foreign-flag ship under the Norris-LaGuardia Act, 29 U. S. C. § 101 *et seq.* The Court held that in such circumstances the district courts had no jurisdiction. However, as we later noted in *McCulloch*, 372 U. S., at 18, *Marine Cooks* "cannot be regarded as limiting the earlier *Benz* holding . . . since no question as to 'whether the picketing . . . was tortious under state or federal law' was either presented or decided." Obviously the question whether Congress intended the federal courts to stay out of the labor injunction business involves significantly different considerations from the question whether Congress intended the Labor Management Relations Act to apply to the type of picketing of foreign ships involved here.

State of Texas were prevented by the LMRA from entertaining petitioners' suit for an injunction.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Today's reversal of the Texas Court of Civil Appeals does not, of course, end this case. There remain for disposition on remand two of the respondents' defenses not reached by the Texas courts, namely (1) that Texas law does not proscribe respondents' picketing, and (2) that, in any event, the First and Fourteenth Amendments protect respondents' conduct.[1]

But the fact that today's decision does not finally decide the legality of respondents' picketing should not obscure the significance of the Court's holding. Ninety-five percent of our export trade has already fled American-flag vessels for cheaper, foreign-registered shipping.[2] In holding that respondents' picketing against foreign-flag vessels does not give rise to a dispute "affecting commerce" within the National Labor Relations Board's jurisdiction, the Court effectively deprives American seamen, among all American employees in commerce, of any federally protected weapon with which to try to save their jobs.[3] Additionally, the Court creates new difficul-

[1] See *NLRB* v. *Fruit & Vegetable Packers*, 377 U. S. 58 (1964); *id.*, at 76 (Black, J., concurring); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

[2] See S. Rep. No. 91-1080, p. 16 (1970). See also *id.*, at 17 (Chart 7: Projected Decline in Seafaring Job Opportunities in Foreign Trade Fleet from 1969 to 1980).

[3] Those meager materials to be found in the congressional debates concerning the Labor Management Relations Act contradict the notion that Congress meant to distinguish among American workingmen for purposes of defining the Board's jurisdiction over labor disputes affecting commerce. See H. R. Rep. No. 245, 80th Cong., 1st Sess., 4 (1947), discussed in *Benz* v. *Compania Naviera Hidalgo*,

ties for the Board in its administration of the Act by making the Board's statutory jurisdiction turn on the identity of the competitor that might be affected by the picketing—a distinction relevant in the determination whether picketing is protected or prohibited activity under the Act, but a distinction rejected in other contexts in the determination of Board jurisdiction.[4]

There is, of course, no doubt that Congress possesses the power to subject foreign shipping in American terri-

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353 U. S. 138, 142–144 (1957). See also *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195, 198–199 (1970).

[4] Thus, the Court refused to make that distinction even where the language of the Act might have been read as indicating that Congress meant to draw it. In *Teamsters* v. *New York, N. H. & H. R. Co.*, 350 U. S. 155 (1956), a union engaged in the over-the-road trucking of freight picketed a railroad loading yard to protest the "piggy-backing" of truck trailers on railroad cars that was curtailing their opportunities for employment. The railroad, subject to the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, was a "person" exempted from the NLRA's definition of "employer." 29 U. S. C. § 152 (2).

Nonetheless, the Court relied upon the finding of the lower court that the "union was in no way concerned with [the railroad's] labor policy," and held that the dispute was subject to the jurisdiction of the National Labor Relations Board. The Court said:

"This interpretation permits the harmonious effectuation of three distinct congressional objectives: (1) to provide orderly and peaceful procedures for protecting the rights of employers, employees and the public in labor disputes so as to promote the full, free flow of commerce, as expressed in § 1 (b) of the Labor Management Relations Act; (2) to maintain the traditional separate treatment of employer-employee relationships of railroads subject to the Railway Labor Act; and (3) to minimize 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' *Garner* v. *Teamsters Union*, 346 U. S. 485, 490." 350 U. S., at 160–161.

In contrast, there is no wording in the statute, or any legislative history, supporting a reading that Congress meant to draw that line as to seamen.

torial waters to the federal labor laws.[5] And the Court concedes that the picketing activities involved here fall literally within the term "commerce" as used in the Labor Management Relations Act. *Ante,* at 112.

After acknowledging the paucity of support for an exclusion in the term "commerce," the Court, however, concludes that prior cases construing the "affecting commerce" limitation in §§ 2 (6), 2 (7), and 10 (29 U. S. C. §§ 152 (6), 152 (7), and 160) support the holding that respondents' picketing against foreign-flag vessels is conduct not cognizable by the Board. With respect, I think that the Court misreads those cases, and also fails to take account of other relevant congressional and judicial guidance that leads to a contrary conclusion.

As the Court concedes, none of the cases relied upon reached the question before us, that is, whether American seamen may employ economic weapons to try to save their jobs by improving the competitive positions of their domestic employers *vis-à-vis* foreign shipping. Yet the Court relies upon those decisions as supporting the proposition that we must conclude that Congress "simply did not intend that Act [LMRA] to erase longstanding principles of comity and accommodation in international maritime trade," *ante,* at 112–113, because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels. Not a word or sentence in any opinion in those cases supports that reading. Rather, those decisions

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[5] See *Benz* v. *Compania Naviera Hidalgo, supra,* at 142:

"It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. *Wildenhus's Case,* 120 U. S. 1 (1887). . . . It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters."

rested squarely upon the reasoning that, in circumstances where Board cognizance of a dispute will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels, Congress could not be understood to have granted the Board jurisdiction of the dispute.

In *Benz* v. *Compania Naviera Hidalgo,* 353 U. S. 138 (1957), the seminal case in this area, an American union attempted to organize the foreign crew of a vessel operating under a foreign flag. The Court, holding that Congress did not fashion the LMRA "to resolve labor disputes between nationals of other countries operating ships under foreign laws," *id.,* at 143, said:

> "It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing." *Id.,* at 142.

Similarly, subsequent decisions also turned jurisdiction on the determination whether Board cognizance would require the Board to inquire into the internal relations between the foreign ship's crew and its foreign owner. In *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (1963), we held that the Board did not have jurisdiction to order an election on a foreign-flag vessel, for

> "to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports." *Id.,* at 19.

In *Incres S. S. Co.* v. *Maritime Workers,* 372 U. S. 24 (1963), the issue was whether the Board had power to

adjudicate the legality of the efforts of a union to organize the members of a foreign crew. Again, the Court held that the Board was without jurisdiction under the Act, since adjudication of that question would require that the Board examine into the relations between that crew and its foreign-flag employer. *Id.*, at 27–28.

The question whether a labor dispute would necessitate Board inquiry into the relations between foreign vessels and crews was yet again central in *Longshoremen* v. *Ariadne Co.*, 397 U. S. 195 (1970), the most recent of the cases where we sustained Board jurisdiction of a dispute involving picketing of a foreign-flag ship in protest against wages being paid to American longshoremen unloading the foreign vessel in an American port. We held that the prohibited inquiry would not result in that case, explaining:

> "We hold that [the longshoremen's] activities were not ['maritime operations of foreign-flag ships']. The American longshoremen's short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order.' Application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law. We therefore find that these longshore operations were in 'commerce' within the meaning of § 2 (6), and thus might have been subject to the regulatory power of the National Labor Relations Board." *Id.*, at 200.

Thus, the only appropriate issue in the instant case is whether NLRB cognizance of respondents' picketing

would require that the Board inquire into the "internal discipline and order" of foreign vessels, and thus threaten "interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law." Tested by that principle, I conclude, contrary to the Court, that this case falls under *Ariadne* rather than under *Benz*.

Ariadne is the controlling precedent even if the Court is correct that this dispute "could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country." *Ante*, at 114. For respondents' picketing is not directed at forcing the shipowners to make that or any other accommodation that could be characterized as interference with relations between crews and shipowners. Respondents' target is to persuade shippers not to patronize foreign vessels, and respondents have no concern with the form of the shipowners' response that makes their efforts succeed.[6]

Similarly, *Ariadne* is the controlling precedent even if the Court is right that "[v]irtually none of the predict-

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[6] The picket signs were not directed to improvement of the foreign crews' wages and working conditions. The protest was carefully phrased to appeal to shippers not to patronize the foreign ships because payment of wages "substandard to those of American seamen . . . results in extreme damage to our wage standards and loss of our jobs." Thus, cognizance of the dispute to determine the legality of the picketing as an unfair labor practice need not involve the Board in an inquiry whether the picketing called for an employer response in the form of an increase in the crews' wages. This would not of course mean that respondents would prevail on the merits. There may well be a question, for example, whether the picketing falls within the ban of § 8 (b) (7), 29 U. S. C. § 158 (b) (7), as prohibited recognitional picketing. See Rosen, Area Standards Picketing, 23 Lab. L. J. 67 (1972); Note, Picketing for Area Standards: An Exception to Section 8 (b) (7), 1968 Duke L. J. 767.

able responses of a foreign shipowner to picketing of this type . . . would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA [as it amended the NLRA] was designed to regulate." *Ante,* at 115. The question whether this case falls within the Board's jurisdiction does not turn on the "predictable responses" of the foreign shipowner but, under our cases from *Benz* to *Ariadne,* solely on the question whether cognizance of respondents' activity would involve the Board in an examination into the internal relations between the foreign crews and shipowners. Cognizance of respondents' conduct in this case would not appear to require that inquiry. In any event, as the Texas Court of Civil Appeals correctly observed, it suffices for Board jurisdiction of that conduct that it is arguable whether that inquiry is required, for in such case it is for the Board to determine in the first instance whether that conduct involves a labor dispute within its cognizance. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959).

But my disagreement with the Court does not rest alone on its failure adequately to rationalize and distinguish the case law. As the Court states, the Nation's labor laws must be read in light of the longstanding involvement of Congress with maritime affairs. If that involvement is examined, however, it will demonstrate that, beginning with its first session, 1 Stat. 55, Congress has been deeply engaged in legislating to protect American vessels from competition, usually by enacting discriminatory laws against foreign-flag vessels. Myriad hearings and reports reflect congressional determination that the American merchant marine, largely because of protections afforded American seamen's wages and working conditions in collective bargaining fostered by the National Labor Relations Act, shall have legislative help

to support its efforts to compete on equal terms for a share of our foreign commerce.[7]

This congressional support was highlighted as recently as 1970, in amendments to the Merchant Marine Act, 1936, 46 U. S. C. § 1101 *et seq.*, to which we may look with profit. The declaration of policy of that Act, as amended in 1970, states as its purpose that "[i]t is necessary for the national defense and development of [the United States'] foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States . . . ." That merchant marine is further to be "owned and operated under the United States flag by citizens of the United States, insofar as may be practicable," and is to be "manned with a trained and efficient citizen personnel." 46 U. S. C. § 1101. See also Merchant Marine Act, 1920, 46 U. S. C. § 861. The 1936 Act furthers those aims by providing subsidies for the construction and operation of American-flag shipping, 46 U. S. C. §§ 1151, 1171, and goes far in imposing discriminations against foreign-flag shipping in regard to certain types of freight. 46 U. S. C.

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[7] See, *e. g.*, H. R. Rep. No. 91–1073 (1970); S. Rep. No. 91–1080 (1970); Hearings on H. R. 12324 and H. R. 12569 before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine & Fisheries, 92d Cong., 2d Sess. (1972) (Cargo for American Ships); Hearings on H. R. 15424, H. R. 15425, and H. R. 15640 before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine & Fisheries, 91st Cong., 2d Sess. (1970) (President's Maritime Program, pt. 2); Hearings on S. 3287 before the Merchant Marine Subcommittee of the Senate Committee on Commerce, 91st Cong., 2d Sess. (1970) (the Maritime Program); Hearings on H. R. 1897, H. R. 2004, and H. R. 2331 before the House Committee on Merchant Marine & Fisheries, 88th Cong., 1st Sess. (1963) (Maritime Labor Legislation).

§ 1241. See also 46 U. S. C. §§ 251, 808 (restricting coastwise trade). Far from conduct in conflict with Congress' legislative policies in the maritime field, respondents' picketing seeks precisely the same goals.

Yet the Court, although not remotely suggesting that respondents' picketing constitutes an illegal intrusion by private citizens into foreign affairs, reaches a conclusion that necessarily implies that Congress was content to leave the whole problem to resolution by the States. It is inconceivable that Congress meant to leave regulation of activity in this area of predominantly national concern to disparate state laws reflecting parochial interests.

I would affirm the judgment of the Texas Court of Civil Appeals.

PHILLIPS PETROLEUM CO. *v.* TEXACO INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 73-347. Decided February 19, 1974

Respondent, relying for federal jurisdiction on 28 U. S. C. § 1331 (a), brought this action in District Court for the reasonable value of helium beyond what petitioner had already paid respondent for natural gas under the sales contract. The District Court granted petitioner's motion to dismiss for lack of federal jurisdiction. The Court of Appeals reversed on the basis of its decision in *Northern Natural Gas Co.* v. *Grounds*, 441 F. 2d 704, a federal interpleader action, in which the court found that the statutory provisions in the Helium Act Amendments of 1960 and the Natural Gas Act do not apply to a sale of commingled helium as a component of the natural gas stream and that natural gas rates authorized by the Federal Power Commission would thus not bar the seller from recovering the reasonable value of the helium constituent. *Held:* Respondent's suit is in effect an action in *quantum meruit*, whose source is state and not federal law. Under the *Grounds* decision, *supra*, those federal statutory provisions do not create a federal right of recovery but only preclude interposition of a plea of payment to defeat a quasi-contractual suit for the helium constituent, which is insufficient to support federal jurisdiction under 28 U. S. C. § 1331 (a). *Gully* v. *First National Bank*, 299 U. S. 109, 113.

Certiorari granted; 481 F. 2d 70, reversed.

PER CURIAM.

The respondent, Texaco, brought this action against the petitioner, Phillips Petroleum Co., in the Northern District of Oklahoma. The complaint asserted that Texaco had not been compensated for the helium constituent of natural gas sold by Texaco to Phillips. Texaco claimed it was entitled to the reasonable value of this helium in addition to the sums already paid by Phillips for the natural gas under the contract of sale.

It is conceded that there is no diversity of citizenship between the parties. Accordingly, Texaco relied, as the basis for federal jurisdiction, on 28 U. S. C. § 1331 (a), asserting that its claim "[arose] under the Constitution, laws, or treaties of the United States." Phillips moved to dismiss for want of federal jurisdiction of the subject matter. The District Court granted this motion, and Texaco appealed to the Court of Appeals for the Tenth Circuit, which by a divided vote reversed the District Court's determination that federal jurisdiction was lacking. Phillips seeks certiorari to review the Tenth Circuit's decision and contends that past decisions of this Court make clear that Texaco's claim cannot be said to "aris[e] under the Constitution, laws, or treaties of the United States."

The substantive claim in this case is an outgrowth of an earlier decision of the Tenth Circuit, *Northern Natural Gas Co.* v. *Grounds*, 441 F. 2d 704 (1971). That was a federal interpleader action, in which the Court of Appeals held that lessee-producers of natural gas could recover the reasonable value of helium contained in the gas that they produced and sold to pipeline companies, which later extracted and marketed the helium. The essence of the *Grounds* decision was its rejection of the buyers' contention that the contract price paid for the natural gas was compensation for "the gas stream in its entirety and, absent an express reservation, [that] the buyer gets the whole stream for such purposes as it may determine." [1] *Id.*, at 720. The Court of Appeals reasoned that, as a result of the Helium Act Amendments of 1960, 74 Stat. 922, which added § 11 (50 U. S. C. § 167i) to the Helium Conservation Act, 43 Stat. 1110,

[1] The price paid here was in accordance with rates sanctioned by the Federal Power Commission, which has authority to establish such rates under the Natural Gas Act of 1938, 52 Stat. 821, 15 U. S. C. §§ 717–717w.

"the Natural Gas Act, and the FPC fixed service rates, do not apply" to "[a] sale of the commingled helium as a component of the [natural] gas stream." 441 F. 2d, at 721. Accordingly, the Court of Appeals concluded that "the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act . . . requires the conclusion that the FPC service rates *do not apply to deny recovery* for the contained helium" in the natural gas stream sold by the lessee-producers. *Id.*, at 723. (Emphasis added.) The court went on to hold that the lessee-producers could therefore recover "the reasonable value of the helium content of the processed gas." *Ibid.*

Because of the presence of federal interpleader jurisdiction, the court in *Grounds* did not consider whether there existed an independent basis for the exercise of federal jurisdiction. Texaco contends that the Court of Appeals in *Grounds* read the Natural Gas Act and § 11 of the Helium Conservation Act together to imply a federal cause of action for the recovery of the reasonable value of the helium constituent in natural gas. On the other hand, Phillips' position is that *Grounds* held only that the effect of these federal statutory provisions is to preclude the defense of payment to a quasi-contractual action brought for the recovery of the reasonable value of the helium. Hence, Phillips argues that the federal questions raised in the complaint are not part of Texaco's claim but are merely asserted in anticipation of a probable defense by Phillips.

This Court has repeatedly held that, in order for a claim to arise "under the Constitution, laws, or treaties of the United States," "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully* v. *First National Bank*, 299 U. S. 109, 112 (1936). The federal questions "must be disclosed upon the face of the complaint, unaided by

the answer." Moreover, "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Gully, supra,* at 113. See also *Metcalf* v. *Watertown,* 128 U. S. 586 (1888); *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454 (1894); *Louisville & Nashville R. Co.* v. *Mottley,* 211 U. S. 149 (1908); *Taylor* v. *Anderson,* 234 U. S. 74 (1914); *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667 (1950).

The *Grounds* case cannot properly be read as creating a federal cause of action, deriving from the Natural Gas Act and § 11 of the Helium Conservation Act, for the recovery of the reasonable value of helium contained in natural gas sold at rates sanctioned by the Federal Power Commission. Indeed, in commenting on its earlier *Grounds* decision, the Court of Appeals in the present case concluded that "satisfactory utility regulation *does not permit* a utility rate to be used to obtain a commodity which is not within the contemplation of that rate." 481 F. 2d 70, 73. (Emphasis added.) In other words, the *Grounds* case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium. In short, the federal statutory provisions do not under *Grounds* create a federal right of recovery, but only preclude the interposition of a plea of payment to defeat a quasi-contractual suit for the value of the helium.[2]

[2] Texaco has not pointed to any language either in the Natural Gas Act and the 1960 Helium Act Amendments or in the legislative history of these enactments that could be read to create a federal cause of action for the recovery of the reasonable value of the helium under the circumstances of this case.

Texaco's suit for the reasonable value of the helium is, in effect, an action in *quantum meruit,* whose source is state law and not federal law. Cf. *Oneida Indian Nation* v. *County of Oneida,* 414 U. S. 661 (1974). To the extent that the Natural Gas Act and the 1960 Helium Act Amendments may bear on this action for the recovery of the reasonable value of constituent helium in natural gas, it is clear that their effect is no more than to overcome a potential defense to the action. Under the settled precedent of our past decisions noted above, it thus cannot be said that this suit "arises under the Constitution, laws, or treaties of the United States." Accordingly, there is no federal jurisdiction under 28 U. S. C. § 1331 (a).

The petition for a writ of certiorari is granted, and the judgment of the Court of Appeals is reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN dissent from the summary disposition of this case without full briefing and oral argument. They would grant the petition and set the case for oral argument.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

LEWIS *v.* CITY OF NEW ORLEANS

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 72-6156. Argued December 10, 1973—
Decided February 20, 1974

On remand from this Court for reconsideration in light of *Gooding* v. *Wilson*, 405 U. S. 518, appellant's conviction of violating a New Orleans ordinance making it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference to" a police officer while in performance of his duties was again sustained by the Louisiana Supreme Court, which did not narrow or refine the words of the ordinance although stating that it was limited to "fighting words" uttered to specific persons at a specific time. *Held:* The ordinance, as thus construed, is susceptible of application to protected speech, and therefore is overbroad in violation of the First and Fourteenth Amendments and facially invalid. The ordinance plainly has a broader sweep than the constitutional definition of "fighting words" as being words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Gooding* v. *Wilson*, *supra*, at 522, since, at the least, "opprobrious language" embraces words that do not fall under that definition, the word "opprobrious" embracing words "conveying or intended to convey disgrace," *id.*, at 525. It is immaterial whether the words appellant used might be punishable under a properly limited ordinance. Pp. 131–134.

263 La. 809, 269 So. 2d 450, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed an opinion concurring in the result, *post*, p. 134. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 136.

John Wilson Reed argued the cause and filed a brief for appellant.

Servando C. Garcia III argued the cause for appellee. With him on the brief was *Blake G. Arata*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Upon the Louisiana Supreme Court's reconsideration of this case in light of *Gooding* v. *Wilson,* 405 U. S. 518 (1972), pursuant to our remand, 408 U. S. 913 (1972), that court, three judges dissenting, again sustained appellant's conviction upon a charge of addressing spoken words to a New Orleans police officer in violation of New Orleans Ordinance 828 M. C. S. § 49–7, 263 La. 809, 269 So. 2d 450 (1972).[1] We noted probable jurisdiction, 412 U. S. 926 (1973), and we reverse. We hold that § 49–7, as construed by the Louisiana Supreme Court, is overbroad in violation of the First and Fourteenth

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[1] On January 3, 1970, appellant and her husband were in their pickup truck following a police patrol car that was taking their young son to a police station after his arrest. An Officer Berner in another patrol car intercepted and stopped the truck. Berner left his car and according to his testimony, asked the husband for his driver's license. Words were exchanged between Berner and appellant and Berner arrested appellant on a charge of violating § 49–7. The parties' respective versions of the words exchanged were in sharp contradiction. Berner testified that appellant left the truck and "started yelling and screaming that I had her son or did something to her son and she wanted to know where he was. . . . She said, 'you god damn m. f. police—I am going to [the Superintendent of Police] about this.'" App. 8. Appellant's husband testified that Berner's first words were "let me see your god damned license. I'll show you that you can't follow the police all over the streets.' . . . After [appellant] got out and said 'Officer I want to find out about my son.' He said 'you get in the car woman. Get your black ass in the god damned car or I will show you something.'" App. 27. Appellant denied that she had used "any profanity toward the officer." App. 37. The Municipal Judge credited Berner's testimony and disbelieved appellant and her husband.

Amendments and is therefore facially invalid. Section 49–7 provides:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."

The Louisiana Supreme Court on remand did not refine or narrow these words, but took them as they stood: "The proscriptions are narrow and specific—wantonly cursing, reviling, and using obscene or opprobrious language." 263 La., at 827, 269 So. 2d, at 456. Nonetheless, that court took the position that, as written, "it [§ 49–7] is narrowed to 'fighting words' uttered to specific persons at a specific time . . . ." *Id.*, at 826, 269 So. 2d, at 456. But § 49–7 plainly has a broader sweep than the constitutional definition of "fighting words" announced in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942), and reaffirmed in *Gooding* v. *Wilson*, *supra*, at 522, namely, "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace." That the Louisiana Supreme Court contemplated a broader reach of the ordinance is evident from its emphasis upon the city's justification for regulation of "the conduct of any person towards a member of the city police while in the actual performance of his duty . . . . Permitting the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty would be unreasonable and basically incompatible with the officer's activities and the place where such activities are performed." 263 La., at 825, 269 So. 2d, at 456.[2]

[2] We have no occasion in light of the result reached to address the conflict between this view and that of the framers of the Model Penal Code that suggests that even "fighting words" as defined by

At the least, the proscription of the use of "opprobrious language," embraces words that do not "by their very utterance inflict injury or tend to incite an immediate breach of the peace." That was our conclusion as to the word "opprobrious" in the Georgia statute held unconstitutional in *Gooding* v. *Wilson,* where we found that the common dictionary definition of that term embraced words "conveying or intended to convey disgrace" and therefore that the term was not limited to words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." 405 U. S., at 525. The same conclusion is compelled as to the reach of the term in § 49–7, for we find nothing in the opinion of the Louisiana Supreme Court that makes any meaningful attempt to limit or properly define—as limited by *Chaplinsky* and *Gooding*—"opprobrious," or indeed any other term in § 49–7. In that circumstance it is immaterial whether the words appellant used might be punishable under a properly limited statute or ordinance. We reaffirm our holding in *Gooding* v. *Wilson, supra,* at 520–521, in this respect:

> "It matters not that the words [appellant] used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when 'no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making

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Chaplinsky should not be punished when addressed to a police officer trained to exercise a higher degree of restraint than the average citizen. See Model Penal Code § 250.1, Comment 4 (Tent. Draft No. 13, 1961).

> the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity' . . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

In sum, § 49–7 punishes only spoken words. It can therefore withstand appellant's attack upon its facial constitutionality only if, as authoritatively construed by the Louisiana Supreme Court, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments. *Cohen* v. *California,* 403 U. S. 15, 18–22 (1971); *Terminiello* v. *Chicago,* 337 U. S. 1, 4–5 (1949); *Gooding* v. *Wilson, supra,* at 520. Since § 49–7, as construed by the Louisiana Supreme Court, is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid.

The judgment of the Louisiana Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring in the result.

I previously concurred in the remand of this case, 408 U. S. 913 (1972), but only for reconsideration in light of *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). Pursuant to the remand order, we now have the Louisiana Supreme Court's decision construing New Orleans Ordinance 828 M. C. S. § 49–7. I agree with the Court's conclusion today that the Louisiana Supreme Court "did not refine or narrow these words [of the ordinance], but took them as they stood." *Ante,* at 132. In conclusory language, that court construed the ordinance to create

a *per se* rule: Whenever "obscene or opprobrious language" is used "toward or with reference to any member of the city police while in the actual performance of his duty," such language constitutes "fighting words" and hence a violation without regard to the facts and circumstances of a particular case. As so construed, the ordinance is facially overbroad.

Quite apart from the ambiguity inherent in the term "opprobrious," words may or may not be "fighting words," depending upon the circumstances of their utterance. It is unlikely, for example, that the words said to have been used here would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered. The words may well have conveyed anger and frustration without provoking a violent reaction from the officer. Moreover, as noted in my previous concurrence, a properly trained officer may reasonably be expected to "exercise a higher degree of restraint" than the average citizen, and thus be less likely to respond belligerently to "fighting words." 408 U. S. 913. See Model Penal Code § 250.1, Comment 4 (Tent. Draft No. 13, 1961).

This ordinance, as construed by the Louisiana Supreme Court, confers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in "one-on-one" situations where the only witnesses are the arresting officer and the person charged. All that is required for conviction is that the court accept the testimony of the officer that obscene or opprobrious language had been used toward him while in performance of his duties.* Indeed, the language need

*The facts in this case, and particularly the direct conflict of testimony as to "who said what," well illustrate the possibility of abuse. *Ante*, at 131 n. 1.

not be addressed directly to the officer since the ordinance is violated even if the objectionable language is used only "with reference to any member of the city police."

Contrary to the city's argument, it is unlikely that limiting the ordinance's application to genuine "fighting words" would be incompatible with the full and adequate performance of an officer's duties. In arrests for the more common street crimes (*e. g.*, robbery, assault, disorderly conduct, resisting arrest), it is usually unnecessary that the person also be charged with the less serious offense of addressing obscene words to the officer. The present type of ordinance tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.

I therefore concur in the result.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Mr. Justice Holmes aptly observed:

> "All rights tend to declare themselves absolute to their logical extreme." *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355 (1908).

The extreme to which we allow ourselves to be manipulated by theory extended to the end of logic is exemplified by the Court's opinion in this case and in its blood brother of two years ago, *Gooding* v. *Wilson,* 405 U. S. 518 (1972). The "overbreadth" and "vagueness" doctrines, as they are now being applied by the Court, quietly and steadily have worked their way into First Amendment parlance much as substantive due process did for the "old Court" of the 20's and 30's. These doctrines are being invoked indiscriminately without regard to the nature of the speech in question, the possible effect the statute or

ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, or the purported or asserted community interest in preventing that speech. And it is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus. This is the compulsion of a doctrine that reduces our function to parsing words in the context of imaginary events. The result is that we are not merely applying constitutional limitations, as was intended by the Framers, and, indeed, as the history of our constitutional adjudication indicates, but are invalidating state statutes in wholesale lots because they "conceivably might apply to others who might utter other words." *Gooding* v. *Wilson,* 405 U. S., at 535 (dissenting opinion).

The application of this elliptical analysis to *Gooding* and to this case is instructive. In *Gooding,* officers were attempting to restore public access to a building when they were met by physical resistance and loud, personal abuse: "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." The defendant was convicted under a Georgia statute which provided that any person "who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." The Court seized upon dictionary definitions and language of Georgia court decisions from the turn of the century. It concluded that the statute swept beyond the bounds of the "fighting words" limitation of *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), despite the fact that the language of the statute virtually tracked the language used by the *Chaplinsky* Court to describe words properly subject to some regulation, and without any demonstra-

tion in reason how "the narrow language of the Georgia statute has any significant potential for sweeping application to suppress or deter important protected speech." 405 U. S., at 529 (BURGER, C. J., dissenting).

In the present case, appellant and her husband were stopped by a police officer. Appellant's and the officer's respective versions of the incident are conflicting, but the municipal judge credited the officer's testimony. That finding, of course, on this record, is binding upon us. The officer testified that while he was waiting for appellant's husband to produce his driver's license, appellant came out of their truck "and started yelling and screaming that I had her son or did something to her son and she wanted to know where he was. I said 'lady I don't have your son and I am not talking to you. I am talking to this man and you can go sit in the truck.' She said 'you god damn m. f. police—I am going to Giarrusso [the police superintendent] to see about this.' I said 'lady you are going to jail—you are under arrest.' She said 'you're not taking me to jail' and she started to get back in the cab of the truck and I caught up to her while she was getting in the cab. I attempted to take her and she started fighting and swinging her arms." App. 8. A fight ensued and appellant was subdued with the help of another officer. Appellant was charged with resisting arrest and with wantonly reviling the police. She was convicted on both charges but appealed only the conviction of wantonly reviling the police.

We remanded this case to the Supreme Court of Louisiana to construe the meaning of the ordinance.[1]

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[1] "Section 49–7. *Cursing, etc., police prohibited.*

"It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."

408 U. S. 913 (1972). That court, after reviewing the applicable precedents, including *Chaplinsky* and *Gooding*, specifically construed the ordinance as "not offensive to protected speech; it is narrowed to 'fighting words' uttered to specific persons at a specific time; it is not overbroad and is therefore not unconstitutional. . . . Any reasonable man knows what it is to wantonly curse or revile . . . . *The Section definitely does not sweep within its proscriptions all forms of abusive and derogatory speech.*" 263 La. 809, 826–827, 269 So. 2d 450, 456 (emphasis in original).

Again, setting the facts to one side, this Court selectively dissects the wording of the Louisiana Supreme Court opinion, eyes the word "opprobrious," refers us to its treatment of "opprobrious" in *Gooding*, observes that "§ 49–7 plainly has a broader sweep than the constitutional definition of 'fighting words' announced in *Chaplinsky*," *ante*, at 132, and concludes that "we find nothing in the opinion of the Louisiana Supreme Court that makes any meaningful attempt to limit or properly define—as limited by *Chaplinsky* and *Gooding*—'opprobrious,' or indeed any other term in § 49–7." *Ante*, at 133. And, again, the ordinance is struck down with no discussion of whether it might significantly affect protected speech, and no reasons why the State's interest in public peace and the harmonious administration of its laws should not prevail over a lone, individual claim that the ordinance is unconstitutional as applied to others. I cannot reconcile what the Court says with what the Louisiana Supreme Court has said. I believe my Brethren of the majority merely seek a result here, just as I was convinced they sought a result in *Gooding*.

Mr. Justice Jackson warned of the dangers of this kind of constitutional analysis:

> "But I did not suppose our function was that of a council of revision. The issue before us is whether

> what has been done has deprived this appellant of a constitutional right. It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Saia* v. *New York*, 334 U. S. 558, 571 (1948) (dissenting opinion).

Overbreadth and vagueness in the field of speech, as the present case and *Gooding* indicate, have become result-oriented rubberstamps attuned to the easy and imagined self-assurance that "one man's vulgarity is another's lyric." *Cohen* v. *California*, 403 U. S. 15, 25 (1971). The danger is apparent. Inherent in the use of these doctrines and this standard is a judicial-legislative confrontation. The more frequent our intervention, which of late has been unrestrained, the more we usurp the prerogative of democratic government. Instead of applying constitutional limitations, we do become a "council of revision." If the Court adheres to its present course, no state statute or city ordinance will be acceptable unless it parrots the wording of our opinions.

This surely is not what the Framers intended and this is not our constitutional function. I would adhere to what Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench in *Chaplinsky*, 315 U. S., at 571–572:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting'

> words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut,* 310 U. S. 296, 309–310." (Footnotes omitted.)

The speech uttered by Mrs. Lewis to the arresting officer "plainly" was profane, "plainly" it was insulting, and "plainly" it was fighting. It therefore is within the reach of the ordinance, as narrowed by Louisiana's highest court. The ordinance, moreover, poses no significant threat to protected speech. And it reflects a legitimate community interest in the harmonious administration of its laws. Police officers in this day perhaps must be thick skinned and prepared for abuse, but a wanton, high-velocity, verbal attack often is but a step away from violence or passioned reaction, no matter how self-disciplined the individuals involved. In the interest of the arrested person who could become the victim of police overbearance, and in the interest of the officer, who must anticipate violence and who, like the rest of us, is fallibly human, legislatures have enacted laws of the kind challenged in this case to serve a legitimate social purpose and to restrict only speech that is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky, supra,* at

572.[2] In such circumstances we should stay our hand and not yield to the absolutes of doctrine.

I see no alternative to our affirmance, and I therefore dissent.

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[2] The suggestion that the ordinance is open to selective enforcement is no reason to strike it down. Courts are capable of stemming abusive application of statutes. See, *e. g.*, *Norwell* v. *City of Cincinnati*, 414 U. S. 14 (1973). Questions of credibility, moreover, have been resolved by courts for centuries and there is no reason to believe the so-called modern age requires any different treatment.

Syllabus

UNITED STATES *v.* KAHN ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72–1328. Argued December 11–12, 1973—
Decided February 20, 1974

On the Government's application for an order authorizing a wiretap interception of the home telephones of respondent Irving Kahn, a suspected bookmaker, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the District Judge entered an order pursuant to 18 U. S. C. § 2518, which described the telephones to be tapped and found probable cause to believe that Mr. Kahn and "others as yet unknown" were using the telephones to conduct an illegal gambling business, and authorized FBI agents to intercept wire communications "of" Mr. Kahn and "others as yet unknown." The agents intercepted incriminating calls made by Mr. Kahn in Arizona to respondent Mrs. Kahn at their home in Chicago, and also incriminating calls made by Mrs. Kahn to "a known gambling figure." The respondents were subsequently indicted for violating the Travel Act. Upon being notified of the Government's intention to introduce the intercepted conversations at trial, respondents moved to suppress them. The District Court granted the motion. The Court of Appeals affirmed, construing the requirements of 18 U. S. C. §§ 2518 (1) (b) (iv) and 2518 (4) (a) that the person whose communications are to be intercepted is to be identified if known, as excluding from the term "others as yet unknown" any persons who careful Government investigation would disclose were probably using the telephones for illegal activities, and that since the Government had not shown that further investigation of Mr. Kahn's activities would not have implicated his wife in the gambling business, she was not a "person as yet unknown" within the purview of the wiretap order. *Held:*

1. Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought, and since it is undisputed here that the Government had no reason to suspect Mrs. Kahn of complicity in the gambling business before the wiretapping

began, it follows that under the statute she was among the class of persons "as yet unknown" covered by the wiretap order. Pp. 151–155.

2. Neither the language of the wiretap order nor that of Title III requires the suppression of legally intercepted conversations to which Mr. Kahn was not himself a party. Pp. 155–158.

471 F. 2d 191, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 158.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Harriet S. Shapiro,* and *Jerome M. Feit.*

Anna R. Lavin argued the cause for respondents. With her on the brief was *Edward J. Calihan, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On March 20, 1970, an attorney from the United States Department of Justice submitted an application for an order authorizing a wiretap interception pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, to Judge William J. Campbell of the United States District Court for the Northern District of Illinois. The affidavit accompanying the application contained information indicating that respondent Irving Kahn was a bookmaker who operated from his residence and used two home telephones to conduct his business.[1] The

[1] The affiant, a special agent of the Federal Bureau of Investigation, provided detailed information about Kahn's alleged gambling activities: This information was derived from the personal observations of three unnamed sources, whose past reliability in gambling

affidavit also noted that the Government's informants had stated that they would refuse to testify against Kahn, that telephone company records alone would be insufficient to support a bookmaking conviction, and that physical surveillance or normal search-and-seizure techniques would be unlikely to produce useful evidence. The application therefore concluded that "normal investigative procedures reasonably appear to be unlikely to succeed," and asked for authorization to intercept wire communications of Irving Kahn and "others as yet unknown" over two named telephone lines, in order that information concerning the gambling offenses might be obtained.

Judge Campbell entered an order, pursuant to 18 U. S. C. § 2518, approving the application.[2] He specifi-

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investigations was described by the affiant. In addition, the information was corroborated by telephone company records showing calls on Kahn's telephones to and from a known gambling figure in another State.

The Government's application and the accompanying affidavit also claimed that one Jake Jacobs was using a telephone at his private residence to conduct an illegal gambling business. The subsequent order of the District Court authorizing wire interceptions also covered Jacobs' phone. Any communications intercepted over the Jacobs telephone, however, play no role in the issues now before us.

[2] Title 18 U. S. C. § 2518 provides in pertinent part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . . . . .

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a par-

cally found that there was probable cause to believe that Irving Kahn and "others as yet unknown" were using the two telephones to conduct an illegal gambling

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ticular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

. . . . . .

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

business, and that normal investigative techniques were unlikely to succeed in providing federal officials with sufficient evidence to successfully prosecute such crimes. The order authorized special agents of the FBI to "intercept wire communications of Irving Kahn and others as yet unknown" to and from the two named telephones concerning gambling activities.

The authorization order further provided that status reports were to be filed with Judge Campbell on the fifth and 10th days following the date of the order, showing what progress had been made toward achievement of the order's objective, and describing any need for further interceptions.[3] The first such report, filed with Judge Campbell on March 25, 1970, indicated that the wiretap had been terminated because its objectives had been attained. The status report gave a summary of the information garnered by the interceptions, stating in part that on March 21 Irving Kahn made two telephone calls from Arizona to his wife at their home in Chicago and discussed gambling wins and losses, and that on the same date Minnie Kahn, Irving's wife, made two telephone calls from the intercepted telephones to a person described in the status report as "a known gambling figure," with whom she discussed various kinds of betting information.

Both Irving and Minnie Kahn were subsequently indicted for using a facility in interstate commerce to promote, manage, and facilitate an illegal gambling busi-

[3] Title 18 U. S. C. § 2518 (6) provides in pertinent part:

"Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require."

ness, in violation of 18 U. S. C. § 1952.[4] The Government prosecutor notified the Kahns that he intended to introduce into evidence at trial the conversations intercepted under the court order. The Kahns in turn filed motions to suppress the conversations. These motions were heard by Judge Thomas R. McMillen in the Northern District of Illinois, who, in an unreported opinion, granted the motion to suppress. He viewed any conversations between Irving and Minnie Kahn as within the "marital privilege," and hence inadmissible

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[4] The Travel Act, 18 U. S. C. § 1952, provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

"and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102 (6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury."

The indictment in this case stated that the alleged gambling activities attributed to the Kahns were in violation of Ill. Rev. Stat., c. 38, §§ 28–1 (a), (2), and (10).

at trial.[5] In addition, all other conversations in which Minnie Kahn was a participant were suppressed as being outside the scope of Judge Campbell's order, on the ground that Minnie Kahn was not a person "as yet unknown" to the federal authorities at the time of the original application.

The Government filed an interlocutory appeal from the suppression order.[6] A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed that part of the District Court's order suppressing all conversations of Minnie Kahn, but reversed that part of the order based on the marital privilege. 471 F. 2d 191. The court held that under the wiretap order all intercepted conversations had to meet two requirements before they could be admitted into evidence:

> "(1) that Irving Kahn be a party to the conversations, and (2) that his conversations intercepted be with 'others as yet unknown.'" *Id.*, at 195.

The court then construed the statutory requirements of 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a) that the person whose communications are to be intercepted is to be identified if known, as excluding from the term "others as yet unknown" any "persons [who] careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities." *Id.*, at 196. Since the Government in this case had not shown that further investi-

[5] Title 18 U. S. C. § 2517 (4) provides that:

"No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

[6] Title 18 U. S. C. § 2518 (10)(b) gives the United States the right to take an interlocutory appeal from an order granting a motion to suppress intercepted wire communications. In addition, 18 U. S C. § 3731 generally provides for appeals by the Government from pretrial orders suppressing evidence.

gation of Irving Kahn's activities would not have implicated Minnie in the gambling business, the Court of Appeals felt that Mrs. Kahn was not a "person as yet unknown" within the purview of Judge Campbell's order.

We granted the Government's petition for certiorari, 411 U. S. 980, in order to resolve a seemingly important issue involving the construction of this relatively new federal statute.[7]

At the outset, it is worth noting what issues are not involved in this case. First, we are not presented with an attack upon the constitutionality of any part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Secondly, review of this interlocutory order does not involve any questions as to the propriety of the Justice Department's internal procedures in authorizing the application for the wiretap.[8] Finally, no argument is presented that the federal agents failed to conduct the wiretap here in such a manner as to minimize the interception of innocent conversations.[9] The question presented is simply whether the conversations that the Government wishes to introduce into evidence at the respondents' trial are made inadmissible by the "others as yet unknown" language of Judge Campbell's order or by the corresponding statutory requirements of Title III.

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[7] The Kahns' cross-petition for certiorari, raising the marital privilege argument, was denied. 411 U. S. 986.

[8] Such issues are currently *sub judice* in *United States* v. *Giordano*. No. 72–1057, and *United States* v. *Chavez*, No. 72–1319.

[9] In relevant part, 18 U. S. C. § 2518 (5) requires:

"Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ."

In deciding that Minnie Kahn was not a person "as yet unknown" within the meaning of the wiretap order, the Court of Appeals relied heavily on an expressed objective of Congress in the enactment of Title III: the protection of the personal privacy of those engaging in wire communications.[10] In light of this clear congressional concern, the Court of Appeals reasoned, the Government could not lightly claim that a person whose conversations were intercepted was "unknown" within the meaning of Title III. Thus, it was not enough that Mrs. Kahn was not known to be taking part in any illegal gambling business at the time that the Government applied for the wiretap order; in addition, the court held that the Government was required to show that such complicity would not have been discovered had a thorough investigation of Mrs. Kahn been conducted before the wiretap application.

In our view, neither the legislative history nor the specific language of Title III compels this conclusion. To be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a weapon against the operations of organized crime.[11] There is, of course, some tension between these two stated congressional objectives, and the question of how Congress struck the balance in any particular instance cannot be resolved simply through general reference to the statute's expressed concern for the protection of individual privacy. Rather, the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III.

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[10] See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, Tit. III, §§ 801 (b) and (d), 82 Stat. 211; S. Rep. No. 1097, 90th Cong., 2d Sess., 66.

[11] See § 801 (c) of the above Act, 82 Stat. 211; S. Rep. No. 1097, *supra*, at 66–76.

Section 2518 (1) of Title 18 U. S. C. sets out in detail the requirements for the information to be included in an application for an order authorizing the interception of wire communications. The sole provision pertaining to the identification of persons whose communications are to be intercepted is contained in § 2518 (1)(b)(iv), which requires that the application state "the identity of the person, if known, *committing the offense* and whose communications are to be intercepted." (Emphasis supplied.) This statutory language would plainly seem to require the naming of a specific person in the wiretap application only when law enforcement officials believe that such an individual is actually committing one of the offenses specified in 18 U. S. C. § 2516. Since it is undisputed here that Minnie Kahn was not known to the Government to be engaging in gambling activities at the time the interception order was sought, the failure to include her name in the application would thus seem to comport with the literal language of § 2518 (1)(b)(iv).

Moreover, there is no reason to conclude that the omission of Minnie Kahn's name from the actual wiretap order was in conflict with any of the provisions of Title III. Section 2518 (4)(a) requires that the order specify "the identity of the person, if known, whose communications are to be intercepted." Since the judge who prepares the order can only be expected to learn of the target individual's identity through reference to the original application, it can hardly be inferred that this statutory language imposes any broader requirement than the identification provisions of § 2518 (1)(b)(iv).

In effect, the Court of Appeals read these provisions of § 2518 as if they required that the application and order identify "all persons, known or discoverable, who are committing the offense and whose communications are to be intercepted." But that is simply not what

the statute says: identification is required only of those "known" to be "committing the offense." Had Congress wished to engraft a separate requirement of "discoverability" onto the provisions of Title III, it surely would have done so in language plainer than that now embodied in § 2518.

Moreover, the Court of Appeals' interpretation of § 2518 would have a broad impact. A requirement that the Government fully investigate the possibility that any likely user of a telephone was engaging in criminal activities before applying for an interception order would greatly subvert the effectiveness of the law enforcement mechanism that Congress constructed. In the case at hand, the Court of Appeals' holding would require the complete investigation, not only of Minnie Kahn, but also of the two teen-aged Kahn children and other frequenters of the Kahn residence before a wiretap order could be applied for. If the telephone were in a store or an office, the Government might well be required to investigate everyone who had access to it—in some cases, literally hundreds of people—even though there was no reason to suspect that any of them were violating any criminal law. It is thus open to considerable doubt that such a requirement would ultimately serve the interests of individual privacy. In any event, the statute as actually drafted contains no intimation of such total investigative demands.[12]

[12] It is true, as the Court of Appeals noted, that 18 U. S. C. §§ 2518 (1)(c) and 2518 (3)(c) require the application to demonstrate, and the judge authorizing any wire interception to find, that "normal investigative procedures" have either failed or appear unlikely to succeed. This language, however, is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. See generally S. Rep. No. 1097, 90th Cong., 2d Sess., 101. Once the necessity for the interception has been shown, §§ 2518 (1)(c) and 2518 (3)(c) do not impose an additional requirement that the Gov-

In arriving at its reading of § 2518, the Court of Appeals seemed to believe that taking the statute at face value would result in a wiretap order amounting to a "virtual general warrant," since the law enforcement authorities would be authorized to intercept communications of anyone who talked on the named telephone line. 471 F. 2d, at 197. But neither the statute nor the wiretap order in this case would allow the federal agents such total unfettered discretion. By its own terms, the wiretap order in this case conferred authority to intercept only communications "concerning the above-described [gambling] offenses." [13] Moreover, in accord with the statute the order required the agents to execute the warrant in such a manner as to minimize the interception of any innocent conversations.[14] And the order limited the length of any possible interception to 15 days, while requiring status reports as to the progress of the wiretap to be submitted to the District Judge every five days, so that any possible abuses might be quickly discovered and halted. Thus, the failure of the order to specify that Mrs. Kahn's conversations might be the subject of interception hardly left the executing agents free to seize at will every communi-

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ernment investigate all persons who may be using the subject telephone in order to determine their possible complicity.

[13] Title 18 U. S. C. § 2518 (4) (c) requires that an order authorizing wire interceptions contain "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates." See also 18 U. S. C. § 2518 (1) (b) (iii), imposing a similar requirement as to the application for a wiretap order.

But cf. 18 U. S. C. § 2517 (5), providing that under certain circumstances intercepted conversations involving crimes other than those identified in the order may be used in evidence.

[14] See n. 9, *supra*.

cation that came over the wire—and there is no indication that such abuses took place in this case.[15]

We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

The remaining question is whether, under the actual language of Judge Campell's order, only those intercepted conversations to which Irving Kahn himself was

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[15] The fallacy in the Court of Appeals' "general warrant" approach may be illustrated by examination of an analogous conventional search and seizure. If a warrant had been issued, upon a showing of probable cause, to search the Kahn residence for physical records of gambling operations, there could be no question that a subsequent seizure of such records bearing Minnie Kahn's handwriting would be fully lawful, despite the fact that she had not been identified in the warrant or independently investigated. In fact, as long as the property to be seized is described with sufficient specificity, even a warrant failing to name the owner of the premises at which a search is directed, while not the best practice, has been held to pass muster under the Fourth Amendment. See *Hanger* v. *United States*, 398 F. 2d 91, 99 (CA8); *Miller* v. *Sigler*, 353 F. 2d 424, 428 (CA8) (dictum); *Dixon* v. *United States*, 211 F. 2d 547, 549 (CA5); *Carney* v. *United States*, 79 F. 2d 821, 822 (CA6); *United States* v. *Fitzmaurice*, 45 F. 2d 133, 135 (CA2) (L. Hand, J.); Mascolo, Specificity Requirements for Warrants under the Fourth Amendment: Defining the Zone of Privacy, 73 Dick. L. Rev. 1, 21. See also *United States* v. *Fiorella*, 468 F. 2d 688, 691 (CA2) ("The Fourth Amendment requires a warrant to describe only 'the place to be searched, and the persons or things to be seized,' not the persons from whom things will be seized").

a party are admissible in evidence at the Kahns' trial, as the Court of Appeals concluded. The effect of such an interpretation of the wiretap order in this case would be to exclude from evidence the intercepted conversations between Minnie Kahn and the "known gambling figure" concerning betting information. Again, we are unable to read either the District Court order or the underlying provisions of Title III as requiring such a result.

The order signed by Judge Campbell in this case authorized the Government to "intercept wire communications of Irving Kahn and others as yet unknown . . . to and from two telephones, subscribed to by Irving Kahn." The order does not refer to conversations *between* Irving Kahn and others; rather, it describes "communications *of* Irving Kahn and others as yet unknown" to and from the target telephones. To read this language as requiring that Irving Kahn be a party to every intercepted conversation would not only involve a substantial feat of verbal gymnastics, but would also render the phrase "and others as yet unknown" quite redundant, since Kahn perforce could not communicate except with others.

Moreover, the interpretation of the wiretap authorization adopted by the Court of Appeals is at odds with one of the stated purposes of Judge Campbell's order. The District Judge specifically found that the wiretap was needed to "reveal the identities of [Irving Kahn's] confederates, their places of operation, and the nature of the conspiracy involved." It is evident that such information might be revealed in conversations to which Irving Kahn was not a party. For example, a confederate might call in Kahn's absence, and leave either a name, a return telephone number, or an incriminating message. Or, one of Kahn's associates might himself

come to the family home and employ the target telephones to conduct the gambling business.[16] It would be difficult under any circumstances to believe that a District Judge meant such intercepted conversations to be inadmissible at any future trial; given the specific language employed by Judge Campbell in the wiretap order today before us, such a conclusion is simply untenable.

Nothing in Title III requires that, despite the order's language, it must be read to exclude Minnie Kahn's communications. As already noted, 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a) require identification of the person committing the offense only "if known." The clear implication of this language is that when there is probable cause to believe that a particular telephone is being used to commit an offense but no particular person is identifiable, a wire interception order may, nevertheless, properly issue under the statute.[17] It necessarily follows that Congress could not have intended that the authority to intercept must be limited to those conversations *between* a party named in the order and others, since at least in some cases, the order might not name any specific party at all.[18]

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[16] By referring to the conversations of Kahn and others "to and from" the two telephones, the order clearly envisioned that the "others" might be either receiving or transmitting gambling information *from* the two Kahn telephones. Yet it could hardly be expected in these instances that Irving Kahn would always be the person on the other end of the line, especially since either bettors or Kahn's confederates in the gambling business might often have occasion to dial the telephone numbers in issue.

[17] Such a situation might obtain if a bettor revealed to law enforcement authorities that he had repeatedly called a certain telephone number in order to place wagers, but had never been told the name of the person at the other end of the line.

[18] In fact, the Senate rejected an amendment to Title III that would have provided that only the conversations of those specifically named

For these reasons, we hold that the Court of Appeals was in error when it interpreted the phrase "others as yet unknown" so as to exclude conversations involving Minnie Kahn from the purview of the wiretap order. We further hold that neither the language of Judge Campbell's order nor that of Title III requires the suppression of legally intercepted conversations to which Irving Kahn was not himself a party.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

As a result of our decision in *Berger* v. *New York*, 388 U. S. 41, a wiretap—long considered to be a special kind of a "search" and "seizure"—was brought under the reach of the Fourth Amendment.[1] The dominant feature of that Amendment was the command that "no Warrants shall issue, but upon probable cause"—a requirement which Congress wrote into 18 U. S. C. § 2518.[2]

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in the wiretap order could be admitted into evidence. 114 Cong. Rec. 14718 (1968) (Amendment 735).

[1] Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] Title 18 U. S. C. § 2518 provides in pertinent part:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . . . . .

By § 2518 (3), the judge issuing the warrant must be satisfied by the facts submitted by the police that there is "probable cause" for belief that "an individual" is committing the described offense, § 2518 (3)(a); that there is "probable cause" for belief that particular communications concerning the offense will be attained by interception, § 2518 (3)(b); that normal investigative procedures have been tried but have failed or reasonably appear to be unlikely to succeed or to be too dangerous, § 2518 (3)(c), and that there is "probable cause" for belief that named facilities are being used or are about to be used in the commission of the named offense, § 2518 (3)(d). The Act goes on to state that the judge must specify "the identity of the person, if known, whose communications are to be intercepted." § 2518 (4)(a).

The judge in the present case described the telephones

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

. . . . . .

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

. . . . . .

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

. . . . . .

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted."

to be tapped and found probable cause to believe "Irving Kahn and others as yet unknown" were connected with the commission of specified interstate crimes. The judicial order authorized special federal agents to "intercept wire communications of Irving Kahn and others as yet unknown" concerning these crimes.

The agents intercepted incriminating calls made by Irving Kahn and also incriminating calls made by his wife, Minnie Kahn. The District Court on motions to suppress disallowed use of the conversations of Minnie Kahn; and the Court of Appeals agreed, saying that the probable-cause order made it necessary for the Government to meet two requirements: (1) "that Irving Kahn be a party to the conversations, and (2) that his conversations intercepted be with 'others as yet unknown,'" 471 F. 2d 191, 195. That seems to be a commonsense interpretation, for Irving Kahn when using a phone talks not to himself but with "others" who at the time were "unknown." To construe the warrant as allowing a search of the conversations of anyone putting in calls on the Kahn telephone amounts, as the Court of Appeals said, "to a virtual general warrant in violation" of Mrs. Kahn's rights, *id.*, at 197.

Whether the search would satisfy the Fourth Amendment is not before us, the decision below being based solely on the Act of Congress. Seizure of the words of Mrs. Kahn is not specified in the warrant. The narrow scope of the search that was authorized was limited to Mr. Kahn and those whom he called or who called him.

Congress in passing the present Act legislated, of course, in light of the general warrant. The general warrant historically included a license to search for everything in a named place as well as a license to search all and any places in the discretion of the officers.

Frisbie v. *Butler*, 1 Kirby 213 (Conn.);[3] Quincy's Mass. Rep. 1761–1772, App. I.

In light of the prejudice against general warrants which I believe Congress shared,[4] I would not allow Mrs.

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[3] The warrant in the *Frisbie* case read in relevant part:

"[Y]ou are commanded forthwith to search all suspected places and persons that the complainant thinks proper, to find his lost pork, and to cause the same, and the person with whom it shall be found, or suspected to have taken the same, and have him to appear before some proper authority, to be examined according to law." 1 Kirby 213–214.

The Court ruled:

"With regard to the warrant—Although it is the duty of a justice of the peace granting a search warrant (in doing which he acts judicially) to limit the search to such particular place or places, as he, from the circumstances, shall judge there is reason to suspect; and the arrest to such person or persons as the goods shall be found with: And the warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal"; *id.*, at 215.

[4] The explicit requirements of the wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.*, and their legislative history manifest a congressional effort to prevent law enforcement agents from proceeding by way of general search warrants. Section 2518 (4) (a), of course, requires that a wiretap authorization order identify the person, if known, whose communications are to be intercepted. Sections 2518 (4) (b) and (c) require that the order also specify the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted, and also particularly describe the type of communication to be intercepted and the particular offense to which it relates. Congress also provided that no order "may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization." § 2518 (5). An authorization order, moreover, must specify that the electronic surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." *Ibid.*

Before a wiretap order can issue, Title III also demands that law enforcement officers applying for the order provide the judge

Kahn's conversations to be impliedly covered by the warrant, for to do so allows a search of the entire list of outgoing and incoming calls to the Kahn telephones, even though no showing of probable cause had been made concerning any member of the household other than Mr. Kahn.

I cannot believe that Congress sanctioned that practice.

In the first place, though the agents just heard Mrs. Kahn using the phone on March 21 and though they continued their surveillance until March 25, they took no steps to broaden the warrant to include Mrs. Kahn.[5]

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with information describing the offense, the facility, the type of communication, and the identity of the person, if known, committing the offense and whose communications are to be intercepted, § 2518 (1)(b), because in the view of Congress "[e]ach of these requirements reflects the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101. Furthermore, § 2518 (3) requires the judge, before issuing a wiretap order, to find that there is probable cause to believe that an individual is involved with a particular offense, that particular communications concerning that offense will be intercepted, and that specific facilities are being used or are about to be used in connection with the commission of such offense, or are leased to, listed to, or commonly used by the individual. Congress inserted these provisions because it felt that, with them, "the order will link up specific person, specific offense, and specific place. Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." S. Rep. No. 1097, *supra*, at 102.

See also *id.*, at 74–75; 114 Cong. Rec. 14712, 14750 (remarks of Sen. McClellan); *id.*, at 14728 (Sen. Tydings); *id.*, at 14715 (Sen. Tower); *id.*, at 14763 (Sen. Percy); *id.*, at 14748 (Sen. Mundt).

[5] If the statement made by Mrs. Kahn on the telephone March 21 was incriminating, there would be a question whether it could be the basis for obtaining a broadening of the warrant to include her without violating *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. In that case papers had been seized by officers

There was time[6] to obtain a warrant concerning Mrs. Kahn. I assume that one could have been obtained between March 21 and March 25. Then a judge would have decided the particularity of the search of the Kahn household.

Under today's decision a wiretap warrant apparently need specify but one name and a national dragnet becomes operative. Members of the family of the suspect, visitors in his home, doctors, ministers, merchants, teachers, attorneys, and everyone having any possible connection with the Kahn household are caught up in this web.

I would affirm the judgment below.

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in violation of the parties' Fourth Amendment rights but used by the officials as a basis for demanding in proper form that the owners produce the papers. Mr. Justice Holmes, speaking for the Court, rejected that procedure, saying:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.*, at 392.

[6] Cf. *Johnson* v. *United States*, 333 U. S. 10; *United States* v. *Di Re*, 332 U. S. 581; *Trupiano* v. *United States*, 334 U. S. 699.

UNITED STATES *v.* MATLOCK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72–1355. Argued December 10–11, 1973—
Decided February 20, 1974

Respondent was arrested in the front yard of a house in which he lived along with a Mrs. Graff (daughter of the lessees) and others. The arresting officers, who did not ask him which room he occupied or whether he would consent to a search, were then admitted to the house by Mrs. Graff and, with her consent but without a warrant, searched the house, including a bedroom, which Mrs. Graff told them was jointly occupied by respondent and herself, and in a closet of which the officers found and seized money. Respondent was indicted for bank robbery, and moved to suppress the seized money as evidence. The District Court held that where consent by a third person is relied upon as justification for a search, the Government must show, *inter alia,* not only that it reasonably appeared to the officers that the person had authority to consent, but also that the person had actual authority to permit the search, and that the Government had not satisfactorily proved that Mrs. Graff had such authority. Although Mrs. Graff's statements to the officers that she and respondent occupied the same bedroom were deemed admissible to prove the officers' good-faith belief, they were held to be inadmissible extrajudicial statements to prove the truth of the facts therein averred, and the same was held to be true of statements by both Mrs. Graff and respondent that they were married, which was not the case. The Court of Appeals affirmed. *Held:*

1. When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. Pp. 169–172.

2. It was error to exclude from evidence at the suppression hearings Mrs. Graff's out-of-court statements respecting the joint occupancy of the bedroom, as well as the evidence that both respondent and Mrs. Graff had represented themselves as husband and wife. Pp. 172–177.

(a) There is no automatic rule against receiving hearsay evidence in suppression hearings (where the trial court itself can accord such evidence such weight as it deems desirable), and under the circumstances here, where the District Court was satisfied that Mrs. Graff's out-of-court statements had in fact been made and nothing in the record raised doubts about their truthfulness, there was no apparent reason to exclude the declarations in the course of resolving the issues raised at the suppression hearings. Pp. 172–176.

(b) Mrs. Graff's statements were against her penal interest, since extramarital cohabitation is a state crime. Thus they carried their own indicia of reliability and should have been admitted as evidence at the suppression hearings, even if they would not have been admissible at respondent's trial. Pp. 176–177.

3. Although, given the admissibility of the excluded statements, the Government apparently sustained its burden of proof as to Mrs. Graff's authority to consent to the search, the District Court should reconsider the sufficiency of the evidence in light of this Court's opinion. Pp. 177–178.

476 F. 2d 1083, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 178. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 188.

Deputy Solicitor General Wallace argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Harry R. Sachse, Allan A. Tuttle,* and *Philip R. Monahan.*

Donald S. Eisenberg, by appointment of the Court, 412 U. S. 948, argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973), the Court reaffirmed the principle that the search of property, without warrant and without probable cause,

but with proper consent voluntarily given, is valid under the Fourth Amendment. The question now before us is whether the evidence presented by the United States with respect to the voluntary consent of a third party to search the living quarters of the respondent was legally sufficient to render the seized materials admissible in evidence at the respondent's criminal trial.

I

Respondent Matlock was indicted in February 1971 for the robbery of a federally insured bank in Wisconsin, in violation of 18 U. S. C. § 2113. A week later, he filed a motion to suppress evidence seized by law enforcement officers from a home in the town of Pardeeville, Wisconsin, in which he had been living. Suppression hearings followed. As found by the District Court, the facts were that respondent was arrested in the yard in front of the Pardeeville home on November 12, 1970. The home was leased from the owner by Mr. and Mrs. Marshall. Living in the home were Mrs. Marshall, several of her children, including her daughter Mrs. Gayle Graff, Gayle's three-year-old son, and respondent. Although the officers were aware at the time of the arrest that respondent lived in the house, they did not ask him which room he occupied or whether he would consent to a search. Three of the arresting officers went to the door of the house and were admitted by Mrs. Graff, who was dressed in a robe and was holding her son in her arms. The officers told her they were looking for money and a gun and asked if they could search the house. Although denied by Mrs. Graff at the suppression hearings, it was found that she consented voluntarily to the search of the house, including the east bedroom on the second floor which she said was jointly occupied by Matlock and herself. The east bedroom was searched and the evidence at issue here, $4,995 in cash, was found in a diaper

bag in the only closet in the room.[1] The issue came to be whether Mrs. Graff's relationship to the east bedroom was sufficient to make her consent to the search valid against respondent Matlock.

The District Court ruled that before the seized evidence could be admitted at trial the Government had to prove, first, that it reasonably appeared to the searching officers "just prior to the search, that facts exist which will render the consenter's consent binding on the putative defendant," and, second, that "just prior to the search, facts do exist which render the consenter's consent binding on the putative defendant." There was no requirement that express permission from respondent to Mrs. Graff to allow the officers to search be shown; it was sufficient to show her authority to consent in her own right, by reason of her relationship to the premises. The first requirement was held satisfied because of respondent's presence in the yard of the house at the time of his arrest, because of Gayle Graff's residence in the house for some time and her presence in the house just prior to the search, and because of her statement to the officers that she and the respondent occupied the east bedroom.[2]

The District Court concluded, however, that the Government had failed to satisfy the second requirement and

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[1] There were other seizures in the house and the east bedroom on November 12, but none of them is at issue here.

[2] Mrs. Graff was not advised that she had a right to refuse to consent to the search. The District Court expressed no view as to whether the absence of such advice would render her consent invalid, since it found that her consent, however voluntary, would not bind the respondent with regard to the search of his room. *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), has since made clear, of course, that it is not essential for the prosecution to show that the consenter knew of the right to refuse consent in order to establish that the consent was voluntary.

had not satisfactorily proved Mrs. Graff's actual authority to consent to the search. To arrive at this result, the District Court held that although Gayle Graff's statements to the officers that she and the respondent occupied the east bedroom were admissible to prove the good-faith belief of the officers, they were nevertheless extrajudicial statements inadmissible to prove the truth of the facts therein averred. The same was true of Mrs. Graff's additional statements to the officers later on November 12 that she and the respondent had been sleeping together in the east bedroom regularly, including the early morning of November 12, and that she and respondent shared the use of a dresser in the room. There was also testimony that both Gayle Graff and respondent, at various times and places and to various persons, had made statements that they were wife and husband. These statements were deemed inadmissible to prove that respondent and Gayle Graff were married, which they were not, or that they were sleeping together as a husband and wife might be expected to do. Having excluded these declarations, the District Court then concluded that the remaining evidence was insufficient to prove "to a reasonable certainty, by the greater weight of the credible evidence, that at the time of the search, and for some period of reasonable length theretofore, Gayle Graff and the defendant were living together in the east bedroom." The remaining evidence, briefly stated, was that Mrs. Graff and respondent had lived together in a one-bedroom apartment in Florida from April to August 1970; that they lived at the Marshall home in Pardeeville from August to November 12, 1970; that they were several times seen going up or down stairs in the house together; and that the east bedroom, which respondent was shown to have rented from Mr. and Mrs. Marshall, contained evidence that it was also lived in by

a man and a woman.[3] The District Court thought these items of evidence created an "inference" or at least a "mild inference" that respondent and Gayle Graff at times slept together in the east bedroom, but it deemed them insufficient to satisfy the Government's burden of proof. The District Court also rejected the Government's claim that it was required to prove only that at the time of the search the officers could reasonably have concluded that Gayle Graff's relationship to the east bedroom was sufficient to make her consent binding on respondent.

The Court of Appeals affirmed the judgment of the District Court in all respects. 476 F. 2d 1083. We granted certiorari, 412 U. S. 917, and now reverse the Court of Appeals.

II

It has been assumed by the parties and the courts below that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial. This basic proposition was accepted by the Seventh Circuit in this case, 476 F. 2d, at 1086, as it had been in prior cases,[4] and has generally been ap-

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[3] When the officers searched the east bedroom, two pillows were on the double bed, which had been slept in, men's and women's clothes were in the closet, and men's and women's clothes were also in separate drawers of the dresser.

[4] *E. g., United States* v. *Stone*, 471 F. 2d 170, 173 (1972), cert. denied, 411 U. S. 931 (1973); *United States* v. *Wixom*, 441 F. 2d 623, 624–625 (1971); *United States* v. *Airdo*, 380 F. 2d 103, 106–107, cert. denied, 389 U. S. 913 (1967). Each of these cases cited with approval *United States* v. *Sferas*, 210 F. 2d 69, 74 (CA7), cert. denied *sub nom. Skally* v. *United States*, 347 U. S. 935 (1954), which expressed the rule "that where two persons have equal rights

plied in similar circumstances by other courts of appeals,[5] and various state courts.[6] This Court left open, in *Amos* v. *United States*, 255 U. S. 313, 317 (1921), the question whether a wife's permission to search the residence in which she lived with her husband could "waive his constitutional rights," but more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared. In *Frazier* v. *Cupp*, 394 U. S. 731, 740 (1969), the Court "dismissed rather quickly" the contention that the consent of the petitioner's cousin to the search of a duffel bag, which was being used jointly by both men and had been left in the cousin's home, would not justify the seizure of petitioner's cloth-

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to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either."

[5] *E. g.*, *United States* v. *Ellis*, 461 F. 2d 962, 967–968 (CA2), cert. denied, 409 U. S. 866 (1972); *United States* v. *Cataldo*, 433 F. 2d 38, 40 (CA2 1970), cert. denied, 401 U. S. 977 (1971); *United States ex rel. Cabey* v. *Mazurkiewicz*, 431 F. 2d 839, 842–843 (CA3 1970); *United States* v. *Thompson*, 421 F. 2d 373, 375–376 (CA5), vacated on other grounds, 400 U. S. 17 (1970); *Gurleski* v. *United States*, 405 F. 2d 253, 260–262 (CA5 1968), cert. denied, 395 U. S. 981 (1969); *Wright* v. *United States*, 389 F. 2d 996, 998–999 (CA8 1968); *Roberts* v. *United States*, 332 F. 2d 892, 894–898 (CA8 1964), cert. denied, 380 U. S. 980 (1965); *United States* v. *Wilson*, 447 F. 2d 1, 5–6 (CA9 1971); *Nelson* v. *California*, 346 F. 2d 73, 77 (CA9), cert. denied, 382 U. S. 964 (1965); *Burge* v. *United States*, 342 F. 2d 408, 413 (CA9), cert. denied, 382 U. S. 829 (1965).

[6] *E. g.*, *People* v. *Howard*, 166 Cal. App. 2d 638, 651, 334 P. 2d 105, 114 (1958); *People* v. *Gorg*, 45 Cal. 2d 776, 783, 291 P. 2d 469, 473 (1955); *People* v. *Haskell*, 41 Ill. 2d 25, 28–29, 241 N. E. 2d 430, 432 (1968); *People* v. *Walker*, 34 Ill. 2d 23, 27–28, 213 N. E. 2d 552, 555 (1966); *Commonwealth ex rel. Cabey* v. *Rundle*, 432 Pa. 466, 248 A. 2d 197 (1968); *State* v. *Cairo*, 74 R. I. 377, 385–386, 60 A. 2d 841, 845 (1948); *Burge* v. *State*, 443 S. W. 2d 720, 722–723 (Ct. Crim. App. Tex.), cert. denied, 396 U. S. 934 (1969).

ing found inside; joint use of the bag rendered the cousin's authority to consent to its search clear. Indeed, the Court was unwilling to engage in the "metaphysical subtleties" raised by Frazier's claim that his cousin only had permission to use one compartment within the bag. By allowing the cousin the use of the bag, and by leaving it in his house, Frazier was held to have assumed the risk that his cousin would allow someone else to look inside. *Ibid.* More generally, in *Schneckloth* v. *Bustamonte,* 412 U. S., at 245–246, we noted that our prior recognition of the constitutional validity of "third party consent" searches in cases like *Frazier* and *Coolidge* v. *New Hampshire,* 403 U. S. 443, 487–490 (1971), supported the view that a consent search is fundamentally different in nature from the waiver of a trial right. These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.[7] The

[7] Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, see *Chapman* v. *United States,* 365 U. S. 610 (1961) (landlord could not validly consent to the search of a house he had rented to another), *Stoner* v. *California,* 376 U. S. 483 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

issue now before us is whether the Government made the requisite showing in this case.

III

The District Court excluded from evidence at the suppression hearings, as inadmissible hearsay, the out-of-court statements of Mrs. Graff with respect to her and respondent's joint occupancy and use of the east bedroom, as well as the evidence that both respondent and Mrs. Graff at various times and to various persons had represented themselves as husband and wife. The Court of Appeals affirmed the ruling. Both courts were in error.

As an initial matter we fail to understand why, on any approach to the case, the out-of-court representations of respondent himself that he and Gayle Graff were husband and wife were considered to be inadmissible against him. Whether or not Mrs. Graff's statements were hearsay, the respondent's own out-of-court admissions would surmount all objections based on the hearsay rule both at the suppression hearings and at the trial itself, and would be admissible for whatever inferences the trial judge could reasonably draw concerning joint occupancy of the east bedroom. See 4 J. Wigmore, Evidence § 1048 (J. Chadbourn rev. 1972); C. McCormick, Evidence § 262 (2d ed. 1972).[8]

As for Mrs. Graff's statements to the searching officers, it should be recalled that the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissi-

[8] Rule 801 (d)(2)(A) of the proposed Federal Rules of Evidence, approved by the Court on November 20, 1972, and transmitted to Congress, expressly provides that a party's own statements offered against him at trial are not hearsay.

bility of evidence.[9] In *Brinegar* v. *United States*, 338 U. S. 160 (1949), it was objected that hearsay had been used at the hearing on a challenge to the admissibility of evidence seized when a car was searched and that other evidence used at the hearing was held inadmissible at the trial itself. The Court sustained the trial court's rulings. It distinguished between the rules applicable to proceedings to determine probable cause for arrest and search and those governing the criminal trial itself—"There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." *Id.*, at 173. That certain evidence was admitted in preliminary proceedings but excluded at the trial—and the Court thought both rulings proper—was thought merely to "illustrate the difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt." *Id.*, at 174.

That the same rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions was confirmed on November 20, 1972, when the Court transmitted to Congress the proposed Federal Rules of Evidence. Rule 104 (a) provides that preliminary questions concerning admissibility are matters for

[9] *Bridges* v. *Wixon*, 326 U. S. 135, 153–154 (1945), upon which respondent and the Court of Appeals relied, involved the use of hearsay as substantive evidence bearing on the question of Bridges' membership in the Communist Party, a charge upon which a deportation order had been based. In addition to the fact that the use of unsworn, unsigned statements violated the rules of the Board of Immigration Appeals, the evidence was admitted to prove charges which directly jeopardized "the liberty of an individual," *id.*, at 154, and not for the purpose of determining a preliminary question of admissibility, as in this case.

the judge and that in performing this function he is not bound by the Rules of Evidence except those with respect to privileges.[10] Essentially the same language on the scope of the proposed Rules is repeated in Rule 1101 (d)(1).[11] The Rules in this respect reflect the general views of various authorities on evidence. 5 J. Wigmore, Evidence § 1385 (3d ed. 1940); C. McCormick, Evidence § 53, p. 122 n. 91 (2d ed. 1972). See also Maguire & Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale L. J. 1101 (1927).

Search warrants are repeatedly issued on *ex parte* affidavits containing out-of-court statements of identified and unidentified persons. *United States* v. *Ventresca,* 380 U. S. 102, 108 (1965). An arrest and search without a warrant were involved in *McCray* v. *Illinois,* 386 U. S. 300 (1967). At the initial suppression hearing, the police proved probable cause for the arrest by testifying to the out-of-court statements of an unidentified informer. The Government would have been obligated to produce the informer and to put him on the stand had it wanted to use his testimony at defendant's trial, but we sustained the use of his out-of-court statements at the suppression hearing, as well as the Govern-

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[10] Rule 104 (a) provides:

"(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subdivision (b). In making his determination he is not bound by the rules of evidence except those with respect to privileges."

[11] Rule 1101 (d)(1) provides:

"Rules inapplicable. The rules (other than those with respect to privileges) do not apply in the following situations:

"(1) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under Rule 104 (a)."

ment's refusal to identify him. In the course of the opinion, we specifically rejected the claim that defendant's right to confrontation under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment had in any way been violated. We also made clear that there was no contrary rule governing proceedings in the federal courts.

There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel.[12] However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings, and it seems equally clear to us that the trial judge should not have excluded Mrs. Graff's statements in the circumstances present here.

In the first place, the court was quite satisfied that the statements had in fact been made. Second, there is nothing in the record to raise serious doubts about the truthfulness of the statements themselves. Mrs. Graff harbored no hostility or bias against respondent that might call her statements into question. Indeed, she testified on his behalf at the suppression hearings. Mrs. Graff responded to inquiry at the time of the search that she and respondent occupied the east bedroom together. A few minutes later, having led the officers to the bedroom, she stated that she and respondent shared the one dresser in the room and that the woman's clothing in the

[12] "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." C. McCormick, Evidence § 53, p. 122 n. 91 (2d ed. 1972).

room was hers. Later the same day, she stated to the officers that she and respondent had slept together regularly in the room, including the early morning of that very day. These statements were consistent with one another. They were also corroborated by other evidence received at the suppression hearings: Mrs. Graff and respondent had lived together in Florida for several months immediately prior to coming to Wisconsin, where they lived in the house in question and where they were seen going upstairs together in the evening; respondent was the tenant of the east bedroom and that room bore every evidence that it was also occupied by a woman; respondent indicated in prior statements to various people that he and Mrs. Graff were husband and wife. Under these circumstances there was no apparent reason for the judge to distrust the evidence and to exclude Mrs. Graff's declarations from his own consideration for whatever they might be worth in resolving, one way or another, the issues raised at the suppression hearings.

If there is remaining doubt about the matter, it should be dispelled by another consideration: cohabitation out of wedlock would not seem to be a relationship that one would falsely confess. Respondent and Gayle Graff were not married, and cohabitation out of wedlock is a crime in the State of Wisconsin.[13] Mrs. Graff's statements were against her penal interest and they carried their own indicia of reliability. This was sufficient in itself, we think, to warrant admitting them to evidence for consideration by the trial judge. This

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[13] Wis. Stat. § 944.20 (1971) provides:

"Whoever does any of the following may be fined not more than $500 or imprisoned not more than one year in county jail or both: . . . (3) Openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse."

is the case even if they would be inadmissible hearsay at respondent's trial either because statements against penal interest are to be excluded under *Donnelly* v. *United States,* 228 U. S. 243, 272–277 (1913), or because, if Rule 804 (b)(4) of the proposed Federal Rules of Evidence becomes the law, such declarations would be admissible only if the declarant is unavailable at the time of the trial.

Finally, we note that Mrs. Graff was a witness for the respondent at the suppression hearings. As such, she was available for cross-examination, and the risk of prejudice, if there was any, from the use of hearsay was reduced. Indeed, she entirely denied that she either gave consent or made the November 12 statements to the officers that the District Court excluded from evidence. When asked whether in fact she and respondent had lived together, she claimed her privilege against self-incrimination and declined to answer.

IV

It appears to us, given the admissibility of Mrs. Graff's and respondent's out-of-court statements, that the Government sustained its burden of proving by the preponderance of the evidence that Mrs. Graff's voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence the $4,995 found in the diaper bag.[14] But we prefer that the District Court

[14] Accordingly, we do not reach another major contention of the United States in bringing this case here: that the Government in any event had only to satisfy the District Court that the searching officers reasonably believed that Mrs. Graff had sufficient authority over the premises to consent to the search.

The Government also contends that the Court of Appeals imposed an unduly strict standard of proof on the Government by ruling that its case must be proved "to a reasonable certainty, by the great weight of the credible evidence." But the District Court required only that the proof be by the *greater* weight of the evidence and the

first reconsider the sufficiency of the evidence in the light of this decision and opinion. The judgment of the Court of Appeals is reversed and the case is remanded to the Court of Appeals with directions to remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

Respondent William Matlock has been indicted for robbing a federally insured bank in violation of 18 U. S. C. § 2113. The issue in this case involves the suppression of money found in a closet in Matlock's bedroom during a warrantless search of the home in which he lived. The search of the home, and of the bedroom, was authorized by one Gayle Graff, and the Court now remands this case for the District Court to determine, in the light of evidence which that court had previously excluded, whether Mrs. Graff was in fact a joint occupant of the bedroom with sufficient authority to consent to the search. Because I believe that the absence of a search warrant in this case, where the authorities had opportunity to obtain one, is fatal, I dissent from that disposition of this case.

The home which was searched was rented by one William Marshall, and was occupied by members of his

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Court of Appeals merely affirmed the District Court's judgment. There was an inadvertence in articulating the applicable burden of proof, but it seems to have been occasioned by a similar inadvertence by the Government in presenting its case. In any event, the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence. See *Lego* v. *Twomey*, 404 U. S. 477, 488–489 (1972). We do not understand the Government to contend that the standard employed by the District Court was in error, and we have no occasion to consider whether it was.

family, including his wife and his 21-year-old daughter Gayle Graff. Respondent Matlock paid the Marshalls for the use of a bedroom in the home, which he apparently occupied with Gayle Graff. Respondent was arrested in the yard of the home on the morning of November 12, 1970. He offered no resistance, and was restrained in a squad car a distance from the home. Immediately thereafter, officers walked to the home, where Mrs. Graff was present. The officers told her they were searching for guns and money, and asked her whether Matlock lived in the home. After being asked by the officers whether they could search the house, and without being told that she could withhold her consent, Mrs. Graff permitted a police search.

During this first search, three officers entered the house. One of the officers testified that they walked through the kitchen, pantry area, front porch, and living room. The officers asked which bedroom was Matlock's. After Mrs. Graff had indicated the second-floor bedroom which she and Matlock occupied and permitted its search, the officers found a diaper bag half full of money in the bedroom closet. The admissibility of this evidence is involved in the instant case.

The officers left the home, but returned a few minutes later for a second search. This time, they found certain other incriminating items in the pantry area. A third search was made in the afternoon. Again, the officers did not secure a warrant to search the home, but waited for an officer to bring Mrs. Marshall home, at which point they secured her consent to a search. Four officers participated in this search, which discovered further evidence downstairs and in a dresser in Matlock's bedroom.

At no time did the officers participating in any of the three searches, including the first search involved in this case, attempt to procure a search warrant from a judicial officer. The District Court, in a finding which the Gov-

ernment does not challenge, found that there was no exigent circumstance or emergency which could provide an excuse for the Government officers' failure to secure a warrant to invade the security of the Marshall home:

> "At no time on November 12, 1970, was a search warrant obtained by any law enforcement officers for the purpose of conducting a search of the Marshall home. There was adequate time to obtain one or more warrants. There was no emergency, nor danger to any police officer or other persons which required that the search proceed without awaiting the time at which a search warrant could be applied for. The search of the house was not incidental to the arrest of the defendant."

This, I believe, is the crucial finding in the case, rather than the ultimate resolution of the question of Gayle Graff's "authority" to consent to the search. This search is impermissible because of the failure of the officers to secure a search warrant when they had the opportunity to do so.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The judicial scrutiny provided by the second clause of the Amendment is essential to effectuating the Amendment, and if, under that clause a warrant could have been obtained but was not, the ensuing search is "unreasonable" under the Amendment.[1] The intervention of a judicial

[1] The second clause of the Fourth Amendment lays down exacting standards for the issuance of a valid search warrant. The Court,

officer gives the Amendment vitality by restraining unnecessary and unjustified searches and invasions of privacy before they occur. At the same time, a written

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however, in effect reads the provision of the first clause of the Amendment proscribing "unreasonable" searches and seizures to allow it to create classes of judicially sanctioned "reasonable" searches, even when they do not comport with the minimum standards which a warranted search must satisfy. But the history of the Amendment indicates that the Framers added the first clause to give additional protections to the people beyond the prescriptions for a valid warrant, and not to give the judiciary carte blanche to later dilute the warrant requirement by sanctioning classes of warrantless searches.

The form of oppressive search and seizure best known to the colonists was the general warrant, or general writ of assistance, which gave the officials of the Crown license to search all places and for everything in a given place, limited only by their own discretion. See *Warden* v. *Hayden*, 387 U. S. 294, 313–317 (DOUGLAS, J., dissenting). It was this abuse which James Otis condemned in Boston in 1761, see 2 J. Adams, Works 523–525, and which Patrick Henry condemned as Virginia debated the new Constitution in 1788. See 3 J. Elliot, Debates 448. Because the Crown had employed the general warrant, rather than the warrantless search, to invade the privacy of the colonists without probable cause and without limitation, it is not surprising that the hatred of the colonists focused on it.

But in concentrating their invective on the general warrant, the colonists and the Framers did not intend to subject themselves to searches without warrants. We begin with James Otis. In his 1761 speech, Otis not only condemned the general warrant, he also envisioned an acceptable alternative. This was not the search without a warrant, but rather searches under warrants confined by explicit restrictions: "I admit that special writs of assistance, to search special places, may be granted to certain persons on oath." 2 J. Adams, Works 524.

In 1778, during debates on the Constitution prior to passage of the Bill of Rights, Virginia recommended for congressional consideration a series of amendments to the Constitution, one of which guaranteed the security of the citizenry against unreasonable Government searches. This proposed amendment quite clearly presupposed that an "unreasonable" search could be avoided only by

warrant helps ensure that a search will be limited in scope to the areas and objects necessary to the search because both the "place to be searched" and the "things to be seized" must be described with particularity. We have

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use of a warrant, and only if that warrant met certain standards. It did not conceive of warrantless searches:

"That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted." 3 J. Elliot, Debates 658.

Accordingly, when the First Congress convened, James Madison of Virginia officially proposed amendments to the Constitution, including one restricting searches and seizures. Like the original Virginia recommendation, it was nurtured by a fear of the general warrants, and emphasized the warrant requirement:

"The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 434–435.

After being referred to the Committee of Eleven, the amendment was returned to the floor of the House, where it was approved after amendment in a form which closely followed Madison's original proposal, and with its thrust still focusing on the warrant requirement: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." *Id.*, at 754.

Only at this point was the present form of the Amendment, with its two distinct clauses, first suggested. Mr. Benson of New York, chairman of a Committee of Three to arrange the amendments, proposed that "by warrants issuing" be changed to "and no warrant shall issue." His purpose was to *strengthen* the Amend-

therefore held that only the gravest of circumstances could excuse the failure to secure a properly issued search warrant.

Up to now, a police officer had a duty to secure a warrant when he had the opportunity to do so, even if substantial probable cause existed to justify a search. In *Johnson* v. *United States,* 333 U. S. 10, decided in 1948, police officers smelled the unmistakable odor of opium outside a hotel room. They knocked on the door, identified themselves, and told the occupant that they wanted to talk to her. The occupant stepped back acquiescently and admitted the officers. We found that the entry was granted in submission to authority, and

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ment, not to license later judicial efforts to undercut the warrant requirement:

"Mr. Benson objected to the words 'by warrants issuing.' This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read 'and no warrant shall issue.'" *Ibid.*

Benson's amendment was defeated at that point, *ibid.,* but when the Committee of Three returned the amendment to the House, it followed the form suggested by Benson. The prohibition against unreasonable searches was made explicit in a separate clause, and a second clause began with the words earlier proposed by Benson. This form was then accepted, *id.,* at 779, and the Senate concurred. Senate Journal, Aug. 25, 1789. See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 97–103.

The history of the separate clause prohibiting unreasonable searches and seizures demonstrates that it was created in an effort to strengthen the prohibition of searches without proper warrants and to broaden the protections against unneeded invasions of individual privacy. See *id.,* at 103; *Warden* v. *Hayden,* 387 U. S., at 317–318 (DOUGLAS, J., dissenting). It perverts the intent of the Framers to read it as permitting the creation of judicial exceptions to the warrant requirement in all but the most compelling circumstances. See J. Landynski, Search and Seizure and the Supreme Court 42–44.

that the odors alone would not justify the search without a warrant, despite the fact that they would have provided probable cause for a warrant. Since, as in the instant case, no "exceptional circumstances" [2] were cited which might have justified the warrantless search, but only "the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate," *id.*, at 14, 15, we found the warrantless search unconstitutional. Mr. Justice Jackson explained for the Court the need for judicial intervention as a restraint of police conduct before a search was made; and what he said is applicable today:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer,

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[2] By way of illustration, we observed: "No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." 333 U. S., at 15.

not by a policeman or government enforcement agent." *Id.*, at 13–14.

In *Trupiano* v. *United States*, 334 U. S. 699, also decided in 1948, there was a search of an illegal distillery made without a warrant, even though the agents who conducted the search had ample information and time within which to secure a search warrant. Since there was no reason but the convenience of the police which could justify the warrantless search, we found it unreasonable. The police, when not constrained by the limitations of a warrant, are free to rummage about in the course of their search. "[T]hey did precisely what the Fourth Amendment was designed to outlaw. . . . Nothing circumscribed their activities on that raid except their own good senses, which the authors of the Amendment deemed insufficient to justify a search or seizure except in exceptional circumstances not here present." *Id.*, at 706–707. Speaking through Mr. Justice Murphy we explained again the reasons for our insistence on adherence to constitutional processes:

> "This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. . . . In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement." *Id.*, at 705.

Likewise, in *McDonald* v. *United States*, 335 U. S. 451, also decided in 1948, officers with probable cause to engage in a search failed to secure a warrant, and we found the search illegal. Officers had heard an adding machine, frequently used in numbers operations, when outside a rooming house. Entering the house through a window, they looked over the transom of McDonald's room and saw gambling paraphernalia. They shouted to McDonald to open his room, and he did so. Again, there was no grave emergency which alone could justify the failure to secure a warrant, *id.*, at 455, and again we patiently reiterated the reasons for our insistence that the police submit proposed searches to prior judicial scrutiny whenever feasible:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." *Id.*, at 455–456.

Jones v. *United States*, 357 U. S. 493, decided in 1958, provides yet another instance of our recognition of the importance of adherence to judicial processes. Federal alcohol agents had secured a warrant to search a home during the daytime, having observed substantial evidence

that illegal liquor was being produced. Rather than executing the warrant, they waited until the evening, when they entered and searched the home. We held, specifically through Mr. Justice Harlan, that probable cause to believe that the house contained contraband was not sufficient to legitimize a warrantless search: "Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Id.*, at 498.

And, indeed, the provisions of the Fourth Amendment carefully and explicitly restricting the circumstances in which warrants can issue and the breadth of searches have become "empty phrases," when the Court sanctions this search conducted without any effort by the police to secure a valid search warrant. This was not a case where a grave emergency, such as the imminent loss of evidence or danger to human life, might excuse the failure to secure a warrant. Mrs. Graff's permission to the police to invade the house, simultaneously violating the privacy of Matlock and the Marshalls, provides a sorry and wholly inadequate substitute for the protections which inhere in a judicially granted warrant. It is inconceivable that a search conducted without a warrant can give more authority than a search conducted with a warrant. See *United States* v. *Lefkowitz*, 285 U. S. 452, 464. But here the police procured without a warrant all the authority which they had under the feared general warrants, hatred of which led to the passage of the Fourth Amendment. Government agents are now free to rummage about the house, unconstrained by anything except their own desires.[3] Even after finding items

[3] For an example of the abuse to which a warrantless search is subject, see *Kremen* v. *United States*, 353 U. S. 346, where the police gutted a home during a warrantless search.

which they may have expected to find and which doubtless would have been specified in a valid warrant, see *Coolidge* v. *New Hampshire*, 403 U. S. 443, 471, they prolonged their exploratory search in pursuit of additional evidence. The judgment of whether the intrusion into the Marshalls' and Matlock's privacy was to be permitted was not made by an objective judicial officer respectful of the exacting demands of the Fourth Amendment; nor were the police limited by the need to make an initial showing of probable cause to invade the Marshall home. Since the Framers of the Amendment did not abolish the hated general warrants only to impose another oppressive regime on the people, I dissent.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I would not limit the remand to the determination whether Mrs. Graff was in fact a joint occupant of the bedroom with sufficient authority to consent to the search. In my view the determination is also required that Mrs. Graff consented knowing that she was not required to consent. "It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 277 (1973) (BRENNAN, J., dissenting). I would hold that an individual cannot effectively waive this right if he is totally ignorant of the fact that, in the absence of his consent, such invasions of privacy would be constitutionally prohibited.

CURTIS *v.* LOETHER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72–1035. Argued December 4–5, 1973—
Decided February 20, 1974

The Seventh Amendment of the Constitution entitles either party to demand a jury trial in an action for damages in the federal courts under § 812 of the Civil Rights Act of 1968, which authorizes private plaintiffs to bring civil actions to redress violations of the Act's fair housing provisions. Pp. 191–198.

467 F. 2d 1110, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Jack Greenberg argued the cause for petitioner. With him on the briefs were *Michael Davidson, Sylvia Drew, Eric Schnapper, Patricia D. McMahon, Seymour Pikofsky,* and *Charles L. Black, Jr.*

Robert D. Scott argued the cause for respondents. With him on the brief was *Edward A. Dudek.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 812 of the Civil Rights Act of 1968, 82 Stat. 88, 42 U. S. C. § 3612, authorizes private plaintiffs to bring civil actions to redress violations of Title VIII, the fair housing provisions of the Act, and provides that "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Pottinger,* and *Frank E. Schwelb* for the United States, and by *Norman C. Amaker* for the National Committee against Discrimination in Housing.

actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees . . . ." The question presented in this case is whether the Civil Rights Act or the Seventh Amendment requires a jury trial upon demand by one of the parties in an action for damages and injunctive relief under this section.

Petitioner, a Negro woman, brought this action under § 812, claiming that respondents, who are white, had refused to rent an apartment to her because of her race, in violation of § 804 (a) of the Act, 42 U. S. C. § 3604 (a). In her complaint she sought only injunctive relief and punitive damages; a claim for compensatory damages was later added.[1] After an evidentiary hearing, the District Court granted preliminary injunctive relief, enjoining the respondents from renting the apartment in question to anyone else pending the trial on the merits. This injunction was dissolved some five months later with the petitioner's consent, after she had finally obtained other housing, and the case went to trial on the issues of actual and punitive damages.

Respondents made a timely demand for jury trial in their answer. The District Court, however, held that

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[1] Although the lower courts treated the action as one for compensatory and punitive damages, petitioner has emphasized in this Court that her complaint sought only punitive damages. It is apparent, however, that petitioner later sought to recover actual damages as well. The District Court's pretrial order indicates the judge's understanding, following a pretrial conference with counsel, that the question of actual damages would be one of the issues to be tried. App. 18a. Petitioner in fact attempted to prove actual damages, App. 45a, but her testimony was excluded for failure to comply with a pretrial discovery order. The District Judge later dismissed the claim of actual damages for failure of proof. In these circumstances, it is irrelevant that the pleadings were never formally amended. Fed. Rules Civ. Proc. 15 (b), 16.

jury trial was neither authorized by Title VIII nor required by the Seventh Amendment, and denied the jury request. *Rogers* v. *Loether,* 312 F. Supp. 1008 (ED Wis. 1970). After trial on the merits, the District Judge found that respondents had in fact discriminated against petitioner on account of her race. Although he found no actual damages, see n. 1, *supra,* he awarded $250 in punitive damages, denying petitioner's request for attorney's fees and court costs.

The Court of Appeals reversed on the jury trial issue. *Rogers* v. *Loether,* 467 F. 2d 1110 (CA7 1972). After an extended analysis, the court concluded essentially that the Seventh Amendment gave respondents the right to a jury trial in this action, and therefore interpreted the statute to authorize jury trials so as to eliminate any question of its constitutionality. In view of the importance of the jury trial issue in the administration and enforcement of Title VIII and the diversity of views in the lower courts on the question,[2] we granted certiorari, 412 U. S. 937 (1973).[3] We affirm.

The legislative history on the jury trial question is sparse, and what little is available is ambiguous. There seems to be some indication that supporters of Title VIII were concerned that the possibility of racial prejudice on juries might reduce the effectiveness of civil

[2] The Seventh Circuit here was the first court of appeals to consider this issue, but the reported decisions of the district courts are evenly divided on the question. In addition to the District Court in this case, the court in *Cauley* v. *Smith,* 347 F. Supp. 114 (ED Va. 1972), held that jury trial was not required in an action under § 812. *Kastner* v. *Brackett,* 326 F. Supp. 1151 (Nev. 1971), and *Kelly* v. *Armbrust,* 351 F. Supp. 869 (N. D. 1972), held that jury trial was required.

[3] Petitioner married while the case was pending before the Court, and her motion to change the caption of the case accordingly was granted. 414 U. S. 1140 (1974).

rights damages actions.[4] On the other hand, one bit of testimony during committee hearings indicates an awareness that jury trials would have to be afforded in damages actions under Title VIII.[5] Both petitioner and respondents have presented plausible arguments from the wording and construction of § 812. We see no point to giving extended consideration to these arguments, however, for we think it is clear that the Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal courts under § 812.[6]

The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be pre-

[4] See, *e. g.*, Hearings on Miscellaneous Proposals Regarding Civil Rights before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 2d Sess., ser. 16, p. 1183 (1966).

[5] See Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., pt. 2, p. 1178 (1966).

[6] We recognize, of course, the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971), and cases there cited. In this case, however, the necessity for jury trial is so clearly settled by our prior Seventh Amendment decisions that it would be futile to spend time on the statutory issue, particularly since our result is not to invalidate the Civil Rights Act but only to direct that a certain form of procedure be employed in federal court actions under § 812.

Moreover, the Seventh Amendment issue in this case is in a very real sense the narrower ground of decision. Section 812 (a) expressly authorizes actions to be brought "in appropriate State or local courts of general jurisdiction," as well as in the federal courts. The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment. Since we rest our decision on Seventh Amendment rather than statutory grounds, we express no view as to whether jury trials must be afforded in § 812 actions in the state courts.

served." Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:

> "The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By *common law,* [the Framers of the Amendment] meant . . . not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights." *Parsons* v. *Bedford,* 3 Pet. 433, 446–447 (1830) (emphasis in original).

Petitioner nevertheless argues that the Amendment is inapplicable to new causes of action created by congressional enactment. As the Court of Appeals observed, however, we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights "as a matter too obvious to be doubted." 467 F. 2d, at 1114. Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. See, *e. g., Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469, 477 (1962) (trademark laws); *Hepner* v. *United States,* 213 U. S. 103, 115 (1909) (immigration laws); cf. *Fleitmann* v. *Welsbach Street Lighting Co.,* 240 U. S. 27 (1916) (antitrust laws), and the

discussion of *Fleitmann* in *Ross* v. *Bernhard*, 396 U. S. 531, 535–536 (1970).[7] Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), relied on by petitioner, lends no support to her statutory-rights argument. The Court there upheld the award of backpay without jury trial in an NLRB unfair labor practice proceeding, rejecting a Seventh Amendment claim on the ground that the case involved a "statutory proceeding" and "not a suit at common law or in the nature of such a suit." *Id.*, at 48. *Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication [8] and would substantially interfere with the NLRB's role in the statutory scheme. *Katchen*

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[7] See also *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 401–402 (1946) (Emergency Price Control Act); *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33 (1916) (Safety Appliance Act). The Courts of Appeals have similarly rejected the notion that the Seventh Amendment has no application to causes of action created by statute. See, *e. g.*, *International Brotherhood of Boilermakers* v. *Braswell*, 388 F. 2d 193, 197 (CA5), cert. denied, 391 U. S. 935 (1968); *Simmons* v. *Avisco, Local 713, Textile Workers*, 350 F. 2d 1012, 1018 (CA4 1965); *Arnstein* v. *Porter*, 154 F. 2d 464, 468 (CA2 1946), as well as the decision of the Seventh Circuit in this case, 467 F. 2d, at 1113–1116. See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1266 (1971).

[8] "[T]he concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder." L. Jaffe, Judicial Control of Administrative Action 90 (1965).

v. *Landy*, 382 U. S. 323 (1966), also relied upon by petitioner, is to like effect. There the Court upheld, over a Seventh Amendment challenge, the Bankruptcy Act's grant of summary jurisdiction to the bankruptcy court over the trustee's action to compel a claimant to surrender a voidable preference; the Court recognized that a bankruptcy court has been traditionally viewed as a court of equity, and that jury trials would "dismember" the statutory scheme of the Bankruptcy Act. *Id.*, at 339. See also *Guthrie National Bank* v. *Guthrie*, 173 U. S. 528 (1899). These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.[9]

We think it is clear that a damages action under § 812 is an action to enforce "legal rights" within the meaning of our Seventh Amendment decisions. See, *e. g.*, *Ross* v. *Bernhard*, *supra*, at 533, 542; *Dairy Queen, Inc.* v. *Wood*, *supra*, at 476–477. A damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law.[10]

[9] See *Rogers* v. *Loether*, 467 F. 2d 1110, 1115–1116 (CA7 1972); Developments in the Law, *supra*, n. 7, at 1267–1268.

[10] For example, the Court of Appeals recognized that Title VIII could be viewed as an extension of the common-law duty of innkeepers not to refuse temporary lodging to a traveler without justi-

More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law.[11]

We need not, and do not, go so far as to say that any award of monetary relief must necessarily be "legal" relief. See, *e. g.*, *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U. S. 288 (1960); *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946).[12] A comparison of Title VIII with Title VII of the Civil Rights Act of 1964, where the courts of appeals have held that jury trial is not required in an action for reinstatement and backpay,[13] is

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fication, a duty enforceable in a damages action triable to a jury, to those who rent apartments on a long-term basis. See 467 F. 2d, at 1117. An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." C. Gregory & H. Kalven, Cases and Materials on Torts 961 (2d ed. 1969).

[11] The procedural history of this case generated some question in the courts below as to whether the action should be viewed as one for damages and injunctive relief, or as one for damages alone, for purposes of analyzing the jury trial issue. The Court of Appeals concluded that the right to jury trial was properly tested by the relief sought in the complaint and not by the claims remaining at the time of trial. 467 F. 2d, at 1118–1119. We need express no view on this question. If the action is properly viewed as one for damages only, our conclusion that this is a legal claim obviously requires a jury trial on demand. And if this legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought. *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959); *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 470–473 (1962).

[12] See also *Swofford* v. *B&W, Inc.*, 336 F. 2d 406, 414 (CA5 1964).

[13] *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (CA5 1969); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 802 (CA4), cert. dismissed under Rule 60, 404 U. S. 1006 (1971); cf. *McFerren*

instructive, although we of course express no view on the jury trial issue in that context. In Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution. But the statutory language on which this characterization is based—

> "[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate," 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. II)—

contrasts sharply with § 812's simple authorization of an action for actual and punitive damages. In Title VII cases, also, the courts have relied on the fact that the decision whether to award backpay is committed to the discretion of the trial judge. There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount. Nor is there any sense in which the award here can be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff. Whatever may be the merit of the "equitable" characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief.[14]

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v. *County Board of Education,* 455 F. 2d 199, 202–204 (CA6 1972); *Harkless* v. *Sweeny Independent School District,* 427 F. 2d 319, 324 (CA5 1970), cert. denied, 400 U. S. 991 (1971); *Smith* v. *Hampton Training School,* 360 F. 2d 577, 581 n. 8 (CA4 1966) (en banc); see generally Developments in the Law, *supra,* n. 7, at 1265–1266.

[14] See Comment, The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom, 68 Nw. U. L. Rev. 503, 524–527 (1973).

We are not oblivious to the force of petitioner's policy arguments. Jury trials may delay to some extent the disposition of Title VIII damages actions. But Title VIII actions seeking only equitable relief will be unaffected, and preliminary injunctive relief remains available without a jury trial even in damages actions. *Dairy Queen, Inc.* v. *Wood*, 369 U. S., at 479 n. 20. Moreover, the statutory requirement of expedition of § 812 actions, 42 U. S. C. § 3614, applies equally to jury and nonjury trials. We recognize, too, the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled. Of course, the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or to grant a new trial provides substantial protection against this risk, and respondents' suggestion that jury trials will expose a broader segment of the populace to the example of the federal civil rights laws in operation has some force. More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment.[15] The decision of the Court of Appeals must be

Affirmed.

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[15] Although petitioner has emphasized that the policies underlying the Fair Housing Act are derived from the Thirteenth and Fourteenth Amendments, she expressly "does not maintain that these constitutional considerations could prevent a jury trial if a jury were otherwise required by the Seventh Amendment." Brief for Petitioner 7. Moreover, although the legislative history of Title VIII with respect to jury trials is ambiguous, there is surely no indication that Congress intended to override the requirements of the Seventh Amendment if it mandates that jury trials be provided in § 812 damage actions. We therefore have no occasion to consider in this case any question of the scope of congressional power to enforce § 2 of the Thirteenth Amendment or § 5 of the Fourteenth Amendment.

Syllabus

MORTON, SECRETARY OF THE INTERIOR *v.* RUIZ ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1052. Argued November 5-6, 1973—
Decided February 20, 1974

Respondent Ruiz and his wife, Papago Indians, left their reservation in Arizona in 1940 to live in an Indian community a few miles away and Ruiz found employment at a nearby mine. During a prolonged strike, Ruiz applied for but was denied general assistance benefits under the Snyder Act by the Bureau of Indian Affairs (BIA) because of a provision in the BIA Manual limiting eligibility to Indians living "on reservations" (and in jurisdictions under the BIA in Alaska and Oklahoma). After unsuccessful administrative appeals, respondents instituted this purported class action, claiming, *inter alia*, entitlement to such general assistance as a matter of statutory interpretation. The District Court's summary judgment for petitioner was reversed by the Court of Appeals on the ground that the Manual's residency limitation was inconsistent with the broad language of the Snyder Act, that Congress intended general assistance benefits to be available to all Indians, including those in respondents' position, and that Congress' subsequent actions in appropriating funds for the BIA general assistance program did not serve to ratify the imposed limitation. *Held:*

1. Congress did not intend to exclude from the BIA general assistance program these respondents and their class, who are full-blooded, unassimilated Indians living in an Indian community near their native reservation, and who maintain close economic and social ties with that reservation. Pp. 212-230.

(a) The legislative history of the subcommittee hearings regarding appropriations under the Snyder Act showing that the BIA's usual practice has been to represent to Congress that "on or near" reservations is the equivalent of "on" for purposes of welfare service eligibility, and that successive budget requests were for Indians living "on or near" and not just for those living directly "on," clearly shows that Congress was led to believe that

the programs were being made available to those nonassimilated Indians living *near* the reservation as well as to those living "on," and a fair reading of such history can lead only to the conclusion that Indians situated near the reservation, such as respondents, were covered by the authorization. Pp. 213–229.

(b) The fact that Congress made appropriations during the time the "on reservations" limitation appeared in the BIA Manual does not mean that Congress implicitly ratified the BIA policy, where such limitation had not been published in the Federal Register or in the Code of Federal Regulations, and there is nothing in the legislative history to show that the limitation was brought to the appropriation subcommittees' attention, let alone to the entire Congress. But, even assuming that Congress knew of the limitation when making appropriations, there is no reason to assume that it did not equate the "on reservations" language with the "on or near" category that continuously was described as the service area. P. 230.

2. Assuming, *arguendo*, that the Secretary rationally could limit the "on or near" appropriation to include only Indians who lived directly "on" the reservation (plus those in Alaska and Oklahoma), this has not been validly accomplished. Pp. 230–238.

(a) By not publishing its general assistance eligibility requirement in the Federal Register or in the Code of Federal Regulations, the BIA has failed to comply with the requirements of the Administrative Procedure Act (APA) as to publication of substantive policies. The Secretary's conscious choice not to treat this extremely significant requirement as a legislative-type rule, renders it ineffective so far as extinguishing the rights of those otherwise within the class of beneficiaries contemplated by Congress. Pp. 232–236.

(b) Moreover, the BIA has failed to comply with its own internal procedures, since the "on reservations" limitation is clearly an important substantive policy within the class of directives—those that "inform the public of privileges and benefits available" and of "eligibility requirements"—that the BIA Manual declares are among those to be published. P. 235.

(c) Even assuming the lack of binding effect of the BIA policy, it is too late to argue that the words "on reservations" in the BIA Manual mean something different from "on or near" and therefore are entitled to deference as an administrative interpreta-

tion when, in fact, the two have been continuously equated by the BIA to Congress. Pp. 236–237.

462 F. 2d 818, affirmed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Harry R. Sachse argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Assistant Attorney General Johnson, Edmund B. Clark,* and *Carl Strass.*

Winton D. Woods, Jr., argued the cause for respondents. With him on the brief was *Lindsay E. Brew.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a narrow but important issue in the administration of the federal general assistance program for needy Indians:

> Are general assistance benefits available only to those Indians living *on* reservations in the United States (or in areas regulated by the Bureau of Indian Affairs in Alaska and Oklahoma), and are they thus unavailable to Indians (outside Alaska and Oklahoma) living *off,* although near, a reservation?

The United States District Court for the District of Arizona answered this question favorably to petitioner, the Secretary of the Interior, when, without opinion and on cross-motions for summary judgment, it dismissed the respondents' complaint. The Court of Appeals, one judge dissenting, reversed. 462 F. 2d 818 (CA9 1972). We granted certiorari because of the significance of the

**Jerry C. Straus* filed a brief for the Arapahoe Tribe of Wyoming et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Lee J. Sclar* and *Bruce R. Greene* for the California Indian Legal Services, and by *David H. Getches* for the Native American Rights Fund.

issue and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary and of the Bureau. 411 U. S. 947 (1973).

I

The pertinent facts are agreed upon, although, as to some, the petitioner Secretary denies knowledge but does not dispute them. App. 45–48. The respondents, Ramon Ruiz and his wife, Anita, are Papago Indians and United States citizens. In 1940 they left the Papago Reservation in Arizona [1] to seek employment 15 miles away at the Phelps-Dodge copper mines at Ajo. Mr. Ruiz found work there, and they settled in a community at Ajo called the "Indian Village" and populated almost entirely by Papagos.[2] Practically all the land and most of the homes in the Village are owned or rented by Phelps-Dodge. The Ruizes have lived in Ajo continuously since 1940 and have been in their present residence since 1947. A minor daughter lives with them. They speak and understand the Papago language but only limited English. Apart from Mr. Ruiz' employment with

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[1] The Papago Indian Reservation was established by Executive Orders Nos. 2300 and 2524, S. Doc. No. 53, 70th Cong., 1st Sess., 1008 and 1005, promulgated January 14, 1916, and February 1, 1917, respectively. Later adjustments therein appear to have been effected by the Act of June 28, 1926, 44 Stat. 775; by the Act of Feb. 21, 1931, 46 Stat. 1202; by the Act of July 28, 1937, 50 Stat. 536, 25 U. S. C. §§ 463a–463c; and by the Act of June 13, 1939, 53 Stat. 819. See also the Act of June 18, 1934, § 3, 48 Stat. 984; the Act of May 27, 1955, 69 Stat. 67; and 25 U. S. C. § 463. See *Papago Tribe* v. *United States*, 19 Ind. Cl. Comm'n 394, 433–434 (1968).

[2] Ajo is located within the borders of the Papago aboriginal tribal land. The Indian Claims Commission has found that this land was taken from the Papagos by the United States. *Id.*, at 422–423, 426.

Phelps-Dodge, they have not been assimilated into the dominant culture, and they appear to have maintained a close tie with the nearby reservation.[3]

[3] The following material in the record indicates the close ties retained by the Ajo Indians with the Papago Reservation:

"[M]any of the Papagos [in the Indian Village at Ajo] still maintain and frequently visit homes on the reservation. Many still have cattle there and some even farm there. During the summer many wives and children spend long periods of time living on the reservation. Many of the miners attend reservation dances and other ceremonies, driving to the reservation after work ends in the afternoon and returning early the next morning to Ajo. Some miners still vote in the district elections on the reservation and many seek medical care there. Through the years many of the miners who have either been fired or laid off have returned to the reservation. Thus even some of the most 'acculturated' Ajo Indians still maintain very close ties to the reservation. . . .

"During the prolonged strike of copper miners these ties were frequently strengthened and even extended. During this time of crisis, the members of the Indian Community often used the reservation as a place of refuge and occasionally as a source of food, money, and medical care." Affidavit of Larry R. Stucki, submitted in support of the respondents' motion for summary judgment. App. 84, 86–87.

As to the Ruizes in particular, it is said:

"[T]he whole family returned to South Komelik [on the reservation] during the whole month of August, 1967, and . . . they returned to South Komelik once or twice a month during the remainder of the strike, staying in Ajo only because one child, Mary Ann, was still attending school there.

"Ramon Ruiz . . . still maintained his home in South Komelik and . . . he planned to return there in 4 years when he retires. He had never thought of Ajo as being his real home. His poor command of the English language, in spite of having lived in Ajo for 28 years, tended to confirm this. His son did much of the talking and interpreted for his father frequently . . . . [W]hen the Ruiz[es'] other son was killed in military service in Viet Nam, funeral services were held by the family in the church in Sells [on the reservation].

". . . The siren song of the reservation, in most cases, prevents the complete severance of the umbilical cord to the homeland of these people." *Id.*, at 87.

In July 1967, 27 years after the Ruizes moved to Ajo, the mine where he worked was shut down by a strike. It remained closed until the following March. While the strike was in progress, Mr. Ruiz' sole income was a $15 per week striker's benefit paid by the union.[4] He sought welfare assistance from the State of Arizona but this was denied because of the State's apparent policy that striking workers are not eligible for general assistance or emergency relief.[5]

On December 11, 1967, Mr. Ruiz applied for general assistance benefits from the Bureau of Indian Affairs (BIA). He was immediately notified by letter that he was ineligible for general assistance because of the provision (in effect since 1952) in 66 Indian Affairs Manual 3.1.4 (1965) that eligibility is limited to Indians living "on reservations" and in jurisdictions under the BIA in Alaska and Oklahoma.[6] An appeal to the Superintend-

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[4] Mr. Ruiz so stated at the hearing referred to, *infra*, before the BIA Area Director. App. 11, 16. Mrs. Ruiz at the same hearing stated that she worked about eight hours a week for $1 an hour. App. 19.

[5] See Ariz. Rev. Stat. Ann. § 46–233.A.4 (Supp. 1971–1972) reflecting the amendment by Laws 1962, c. 117, § 23. See also *Graham* v. *Richardson*, 403 U. S. 365 (1971).

Striking workers, however, are eligible for the State's Surplus Commodities Distribution Program. Mr. Ruiz was certified under this program for two successive 90-day periods. App. 49–50.

[6] The Manual provides in pertinent part:

"3.1 *General Assistance.*

".1 *Purpose.* The purpose of the general assistance program is to provide necessary financial assistance to needy Indian families and persons living on reservations under the jurisdiction of this Bureau and in jurisdictions under the Bureau of Indian Affairs in Alaska and Oklahoma.

. . . . .

".4 *Eligibility Conditions.*

"A. *Residence.* Eligibility for general assistance is limited to

ent of the Papago Indian Agency was unsuccessful. A further appeal to the Phoenix Area Director of the BIA led to a hearing, but this, too, proved unsuccessful. The sole ground for the denial of general assistance benefits was that the Ruizes resided outside the boundaries of the Papago Reservation.

The respondents then instituted the present purported class action against the Secretary, claiming, as a matter of statutory interpretation, entitlement to the general assistance for which they had applied, and also challenging the eligibility provision as a violation of Fifth Amendment due process and of the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution.

The Court of Appeals' reversal of the District Court's summary judgment for the Secretary was on the ground that the Manual's residency limitation was inconsistent with the broad language of the Snyder Act, 25 U. S. C. § 13, "that Congress intended general assistance benefits to be available to all Indians, including those in the position" of the Ruizes, 462 F. 2d, at 821, and that subsequent actions of Congress in appropriating funds for the BIA general assistance program did not serve to ratify the imposed limitation. The dissent took the position that the Secretary's policy was within the broad discretionary authority delegated to the Secretary by Congress with respect to the allocation of limited funds.

II

The Snyder Act,[7] 42 Stat. 208, 25 U. S. C. § 13, approved November 2, 1921, provides the underlying con-

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Indians living on reservations and in jurisdictions under the Bureau of Indian Affairs in Alaska and Oklahoma."

[7] The Snyder Act reads in full as follows:

"The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys

gressional authority for most BIA activities including, in particular and importantly, the general assistance program. Prior to the Act, there was no such general authorization. As a result, appropriation requests made by the House Committee on Indian Affairs were frequently stricken on the House floor by point-of-order objections. See H. R. Rep. No. 275, 67th Cong., 1st Sess. (1921); S. Rep. No. 294, 67th Cong., 1st Sess. (1921); 61 Cong. Rec. 4659–4672 (1921). The Snyder Act was designed to remedy this situation. It is comprehensively worded for the apparent purpose of avoiding these point-of-order motions to strike. Since the passage of the Act, the BIA has presented its budget requests without further interruption of that kind and Congress has enacted appropriation bills annually in response to the requests.

The appropriation legislation at issue here, Department

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as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

"General support and civilization, including education.

"For relief of distress and conservation of health.

"For industrial assistance and advancement and general administration of Indian property.

"For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.

"For the enlargement, extension, improvement and repair of the buildings and grounds of existing plants and projects.

"For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges, and other employees.

"For the suppression of traffic in intoxicating liquor and deleterious drugs.

"For the purchase of horse-drawn and motor-propelled passenger-carrying vehicles for official use.

"And for general and incidental expenses in connection with the administration of Indian affairs."

of Interior and Related Agencies Appropriation Act, 1968, Pub. L. 90–28, 81 Stat. 59, 60 (1967), recited:

"BUREAU OF INDIAN AFFAIRS

"Education and Welfare Services

"For expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment (in advance or from date of admission), of care, tuition, assistance, and other expenses of Indians in boarding homes, institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order, and payment of rewards for information or evidence concerning violations of law on Indian reservations or lands; and operation of Indian arts and crafts shops; $126,478,000."

This wording, except for the amount, is identical to that employed in similar legislation for prior fiscal years [8] and, indeed, for subsequent ones.[9] It is to be noted that neither the language of the Snyder Act nor that of the Appropriations Act imposes any geographical limitation on the availability of general assistance benefits and does not prescribe eligibility requirements or the details of any program. Instead, the Snyder Act states that

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[8] See, for example, the Appropriations Act for fiscal 1967, Pub. L. 89–435, 80 Stat. 170, 171 (1966); the Act for fiscal 1966, Pub. L. 89–52, 79 Stat. 174, 175 (1965); and the Act for fiscal 1965, Pub. L. 88–356, 78 Stat. 273, 274 (1964).

[9] See the Appropriations Act for fiscal 1969, Pub. L. 90–425, 82 Stat. 425, 427 (1968); the Act for fiscal 1970, Pub. L. 91–98, 83 Stat. 147, 148 (1969); the Act for fiscal 1971, Pub. L. 91–361, 84 Stat. 669, 670 (1970); the Act for fiscal 1972, Pub. L. 92–76, 85 Stat. 229, 230 (1971); the Act for fiscal 1973, Pub. L. 92–369, 86 Stat. 508, 509 (1972); and the Act for fiscal 1974, Pub. L. 93–120, 87 Stat. 429, 430–431 (1973).

the BIA (under the supervision of the Secretary) "shall direct, supervise, and expend . . . for the benefit, care, and assistance of the Indians throughout the United States" for the stated purposes including, as the two purposes first described, "[g]eneral support" and "relief of distress." This is broadly phrased material and obviously is intended to include all BIA activities.[10]

The general assistance program is designed by the BIA to provide direct financial aid to needy Indians where other channels of relief, federal, state, and tribal, are not available. Benefits generally are paid on a scale equivalent to the State's welfare payments. Any Indian, whether living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which his State participates and no limitation may be placed on social security benefits because of an Indian claimant's residence on a reservation.[11]

In the formal budget request submitted to Congress

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[10] A critic of the Act (who also represented the Ruizes in the administrative proceedings) describes it as follows: "The Synder Act is a familiar and somewhat distressing occurrence in the history of Indian affairs. As in other instances, Congress enacted a very general measure and left the rest up to the Secretary of the Interior and the BIA. The result is that the structure of the welfare system is the BIA's own creation. The regulatory scheme is contained in the departmental manual which remains inaccessible except to a few social workers and persistent attorneys." Wolf, Needed: A System of Income Maintenance for Indians, 10 Ariz. L. Rev. 597, 607–608 (1968) (footnote omitted).

[11] See, for example, 42 U. S. C. § 1352 (b)(2). An Indian thus is entitled to social security and state welfare benefits equally with other citizens of the State. *State ex rel. Williams* v. *Kamp*, 106 Mont. 444, 449, 78 P. 2d 585, 587 (1938); U. S. Dept. of the Interior, Federal Indian Law 287, 516 (1958); Wolf, n. 10, *supra*, at 599.

by the BIA for fiscal 1968, the program was described as follows:

> "General assistance will be provided to needy Indians on reservations who are not eligible for public assistance under the Social Security Act . . . and for whom such assistance is not available from established welfare agencies or through tribal resources." Hearings on Department of the Interior and Related Agencies Appropriations for 1968 before a Subcommittee of the House Committee on Appropriations, 90th Cong., 1st Sess., 777–778 (1967),[12] and Senate Hearings, Fiscal Year 1968, 90th Cong., 1st Sess., 695 (1967).[12a]

III

We are confronted, therefore, with the issues whether the geographical limitation placed on general assistance eligibility by the BIA is consistent with congressional intent and the meaning of the applicable statutes, or, to phrase it somewhat differently, whether the congressional appropriations are properly limited by the BIA's restric-

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[12] Hearings on the Department of the Interior and/or related agencies appropriations before subcommittees of the Senate or House Committee on Appropriations will be hereinafter merely identified as to branch of Congress, fiscal year, and number and session of Congress.

[12a] The hearings for the preceding four years disclose identically worded requests. House Hearings, Fiscal Year 1967, 89th Cong., 2d Sess., 255 (1966), and Senate Hearings, Fiscal Year 1967, 89th Cong., 2d Sess., 267 (1966); House Hearings, Fiscal Year 1966, 89th Cong., 1st Sess., 747–748 (1965), and Senate Hearings, Fiscal Year 1966, 89th Cong., 1st Sess., 653 (1965); House Hearings, Fiscal Year 1965, 88th Cong., 2d Sess., 775 (1964); Senate Hearings, Fiscal Year 1965, 88th Cong., 2d Sess., 148 (1964); House Hearings, Fiscal Year 1964, 88th Cong., 1st Sess., 844 (1963), and Senate Hearings, Fiscal Year 1964, 88th Cong., 1st Sess., 70 (1963).

tions, and, if so, whether the limitation withstands constitutional analysis.

On the initial question, the Secretary argues, first, that the Snyder Act is merely an enabling act with no definition of the scope of the general assistance program, that the Appropriation Act did not provide for off-reservation Indian welfare (other than in Oklahoma and Alaska), and that Congress did not intend to expand the program beyond that presented to it by the BIA request. Secondly, he points to the "on reservations" limitation in the Manual and suggests that Congress was well acquainted with that limitation,[13] and that, by legislating in the light of the Manual's limiting provision, its appropriation amounted to a ratification of the BIA's definitive practice. He notes that, in recent years, Congress has twice rejected proposals that clearly would have provided off-reservation general assistance for Indians.[14]

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[13] The BIA's limitation in practice surfaced at many hearings. See, for example, the testimony of Assistant Commissioner Gifford in 1959:

"I believe the question comes up concerning Indians living off the reservation and who are in need not for these categories but for other types of assistance. In many cases the States and counties say that those Indians ought to be the responsibility of the Bureau of Indian Affairs; that they do not have sufficient funds to take care of them. We have *never* included in our request for welfare appropriations funds to take care of the needs of those Indians living *off the reservation.*" House Hearings, Fiscal Year 1960, 86th Cong., 1st Sess., 801 (1959) (emphasis supplied). See also Senate Hearings, Fiscal Year 1959, 85th Cong., 2d Sess., 291 (1958); Senate Hearings, Fiscal Year 1952, 82d Cong., 1st Sess., 372 (1951); Senate Hearings, Fiscal Year 1950, 81st Cong., 1st Sess., 592 (1949); Senate Hearings, Fiscal Year 1948, 80th Cong., 1st Sess., 598-599 (1947); Senate Hearings, Fiscal Year 1942, 77th Cong., 1st Sess., 160–162, 465–466 (1941).

[14] The bills referred to were H. R. 9621, 87th Cong., 2d Sess. (1962), and H. R. 6279, 88th Cong., 1st Sess. (1963). Each provided that benefits would be available to all Indians in certain

Thus, it is said, Congress has appropriated no funds for general assistance for off-reservation Indians and, as a practical matter, the Secretary is unable to provide such a program.

The Court of Appeals placed primary reliance on the Snyder Act's provision for assistance to "the Indians throughout" the United States. It concluded that the Act envisioned no geographical limitations on Indian programs and that, absent a clear congressional ratification of such a policy, the Secretary was powerless to shrink the coverage down to some lesser group of Indian beneficiaries.

Although we affirm the judgment of the Court of Appeals and its reversal of the judgment of the District Court, we reach its result on a narrower ground. We need not approach the issue in terms of whether Congress intended for *all* Indians, regardless of residence and of the degree of assimilation, to be covered by the general assistance program. We need only ascertain the intent of Congress with respect to those Indian claimants in the case before us. The question, so limited, is whether Congress intended to exclude from the general assistance program these respondents and their class, who are full-blooded, unassimilated Indians living in an Indian community near their native reservation, and who maintain close economic and social ties with that reservation. Except for formal residence outside the physical

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named States, and that the Government would reimburse the State for a percentage of the latter's contribution under the several categorical assistance programs. The failure of these bills can be ascribed just as easily, of course, to the rather arbitrary selection of States, to the specific percentage designated, or to a reluctance to provide for all Indians (rural or urban, assimilated or nonassimilated), as to the increase over the lesser group then being serviced. See *United States* v. *Wise*, 370 U. S. 405, 411 (1962); *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 529 (1947).

boundaries of the Papago Reservation, the respondents, as has been conceded, meet all other requirements for the general assistance program.

IV

There is, of course, some force in the Secretary's argument and in the facts that the BIA's budget requests consistently contained "on reservations" general assistance language and that there was testimony before successive appropriations subcommittees to the effect that assistance of this kind was customarily so restricted. Nonetheless, our examination of this and other material leads us to a conclusion contrary to that urged by the Secretary.

A. In actual practice, general assistance clearly has not been limited to reservation Indians. Indeed, the Manual's provision, see n. 6, *supra,* so heavily relied upon by the Secretary, itself provides that general assistance is available to nonreservation Indians in Alaska and Oklahoma. The rationale proffered for this is:

> "The situation of Indians in Alaska and Oklahoma has historically been unique. Much of Oklahoma was once set aside as an Indian Territory, and though most of the reservations have been abolished, there remains a large area of concentrated Indian population with tribal organization, living on land held in trust by the United States . . . . A similar situation of large concentrations of native Americans, with few reservations and substantial separate legislation prevails in Alaska . . . . The responsibilities of the Bureau of Indian Affairs in these jurisdictions are substantially similar to the Bureau's responsibilities on the reservations." Brief for Petitioner 21.

While this exception is not necessarily irrational, it

definitely demonstrates that the limitation in the budget requests is not rigidly followed by the BIA, inasmuch as most off-reservation Indians in the two named States are regarded as eligible for general assistance funds. If, as the Secretary urges, we are to assume that Congress has been aware of the Manual's provision, Congress was just as clearly on notice that the words "on reservations" did not possess their literal meaning in that context. Surely, some of the reasons for the Alaska-Oklahoma exception are equally applicable to Indians of the Ruiz class.

B. There was testimony in several of the hearings that the BIA, in fact, was not limiting general assistance to those within reservation boundaries and, on more than one occasion, Congress was notified that exceptions were being made where they were deemed appropriate. Notwithstanding the Manual, at least three categories of off-reservation Indians outside Alaska and Oklahoma have been treated as eligible for general assistance. The first is the Indian who relocates in the city through the BIA relocation program and who then is eligible for general assistance for the period of time required for him, under state law, to establish residence in the new location.[15] The second evidently is the Indian from the Turtle Mountain Reservation in North Dakota who lives on trust land near but apart from that reservation.[16] The third appears to be the Indian residing in Rapid City, South Dakota.[17]

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[15] See, for example, Senate Hearings, Fiscal Year 1967, 89th Cong., 2d Sess., 302 (1966) (statement of Commissioner Nash); Senate Hearings, Fiscal Year 1959, 85th Cong., 2d Sess., 293 (1958) (statement of Deputy Commissioner Greenwood).

[16] House Hearings, Fiscal Year 1961, 86th Cong., 2d Sess., 508–510 (1960) (statement of Commissioner Emmons); Tr. of Oral Arg. 15.

[17] Senate Hearings, Fiscal Year 1967, 89th Cong., 2d Sess., 298–301 (1966).

In addition, although not controlling, it is not irrelevant that the "on reservations" limitation in the budget requests has never appeared in the final appropriation bills.

C. Even more important is the fact that, for many years, to and including the appropriation year at issue, the BIA itself made continual representations to the appropriations subcommittees that nonurban Indians living "near" a reservation were eligible for BIA services. Although, to be sure, several passages in the legislative history and the formal budget requests have defined eligibility in terms of Indians living "on reservations," the BIA, not infrequently, has indicated that living "on or near" a reservation equates with living "on" it.

An early example of this appears at the fiscal 1948 Senate Hearing. The following colloquy between Senator McCarran and Assistant Commissioner Zimmerman is one of the stronger statements made to Congress concerning the BIA's policy of limiting general assistance to reservation Indians and yet, within this very dialogue, relied on explicitly by the Secretary, is an indication that "on reservations" is not given a rigid interpretation:

> "Senator McCarran. I have one question right there.
>
> "Do these items address themselves to reservation Indians or nonreservation Indians, or both?
>
> "Take, for instance, this welfare administration fund, $87,786. Is that given to reservation Indians, nonreservation Indians alike?
>
> "Mr. Zimmerman. No, sir; it is not.
>
> "Senator McCarran. To whom is it given?
>
> "Mr. Zimmerman. This money goes to reservation Indians.
>
> "Senator McCarran. Entirely?

"Mr. Zimmerman. Yes.

"Senator McCarran. Now, in my State, for instance, you have in the outskirts of Reno and again on the outskirts of Battle Mountain small Indian villages. Do they get anything in the way of relief?

"Mr. Zimmerman. Those town colonies are treated as reservations.

"Senator McCarran. You regard them as reservations?

"Mr. Zimmerman. Yes; some of them are.

"Senator McCarran. Is the colony outside of the city of Reno a reservation?

"Mr. Zimmerman. For certain purposes the courts have held that it is a reservation.

"Senator McCarran. Do they own the land?

"Mr. Zimmerman. Yes; the Federal Government owns the land.

"Senator McCarran. The Federal Government owns the land?

"Mr. Zimmerman. Yes, sir.

"Senator McCarran. They build their houses on it or the Federal Government?

"Mr. Zimmerman. They build their own houses.

"Senator McCarran. But those Indians do receive the benefits?

"Mr. Zimmerman. They would be eligible; yes, sir." Senate Hearings, Fiscal Year 1948, 80th Cong., 1st Sess., 598–599 (1947).

The interchangeability of "on" and "on or near" appears more directly in later years. In the relocation services section of the BIA's budget justification for fiscal 1959 it is stated:

"It is estimated that within the continental United States there are approximately 400,000 members of Indian tribes and bands. Of this number,

> approximately 300,000 live *on or adjacent to* reservations for which the Bureau assumes some responsibility. On most of the Indian reservations there is a surplus of population in proportion to reservation resources. Opportunities for self-support on or near these reservations are wholly inadequate and the increasing surplus population is faced with the alternative of moving away from the reservation or remaining to live in privation or dependent, partially or wholly, upon some form of public assistance." Senate Hearings, Fiscal Year 1959, 85th Cong., 2d Sess., 288 (1958) (emphasis supplied).[18]

The relocation program is covered by the welfare appropriation. It is designed to provide short-term assistance to the needy Indian who leaves the reservation area and thereby disqualifies himself for the general assistance program. By describing the Indians who "live on or adjacent to reservations" as those entitled to relocation services when they depart, the BIA in effect was telling Congress that "moving away from the reservation" was a possibility even though the Indian lives only "adjacent to" the reservation, and it would seem to follow that the Indian living "adjacent to" the reservation was also eligible for general assistance.

At the fiscal 1962 hearing, Congressman Fenton inquired of Assistant Commissioner Gifford as to the Indian population in the United States. She replied:

> "We have no absolute figure. Our best estimate of Indians on the reservations right now is about 375,000, I think. That is a figure we are using. Of course, there are Indians off of the reservations, and we do not have this count too clearly. How-

[18] Identical language, apart from the population figures, appeared in later BIA budget requests. See, for example, House Hearings, Fiscal Year 1962, 87th Cong., 1st Sess., 116 (1961).

ever, for those we consider our direct responsibility on the reservations——

"Mr. Fenton. To whom we contribute?

"Miss Gifford. Yes we believe it is about 375,000." House Hearings, Fiscal Year 1962, 87th Cong., 1st Sess., 205–206 (1961).

The foregoing statement by the Assistant Commissioner, of course, is not in itself particularly revealing on the issue that confronts us. As can be seen from subsequent hearings, however, the stated figure includes Indians "on or near the reservations" and is not restricted to Indians who live "on." Also, this "on or near" group, in contrast to those who live "off" the reservation, are within the group for whom the BIA assumed "direct responsibility." Obviously, one can never be certain whether this expanded reading of "on" is the result of the BIA's desire, when seeking appropriations, to represent its jurisdiction and function somewhat more broadly than it actually was, or whether it reflects actual policy.

The "on or near" representations continued to be made to Congress. At the fiscal 1963 House hearing, Congressmen questioned Commissioner Nash, Associate Commissioner Officer, and Assistant Commissioner Gifford as to the Indian population served by the BIA:

"Mr. Denton. How many Indians are there at the present time?

"Miss Gifford. You mean the total population?

"Mr. Denton. Yes.

"Miss Gifford. We estimate that the total population *on or near* the reservations that we serve is 380,000.

. . . . .

"Mr. Denton. I expect there is no way you could tell how many Indians there are *off* the reservations.

"Mr. Nash. Well, we can take the total census

figure for the Indian population and subtract those that are listed as living *on or near* the reservations, and this gives us a figure of 172,000 *off* the reservations; 380,000 *on or near* the reservations, including Alaska.

. . . . .

"Mr. Kirwan. What did you say was on the reservation?

"Mr. Nash. 380,000.

. . . . .

"Mr. Officer. We are citing our figure of 380,000 to include those Indians *who live in the reservation vicinity* and are eligible to receive our services, as well as the Indians and other Alaska natives. The total of Alaska natives is 43,000. When we subtract that from 380,000, we have 337,000 Indians who live *on or near* reservations outside Alaska. Now if we are going to be concerned only with those who live on reservations, then we have that figure of 285,000, which was in our press release.

"Mr. Kirwan. We want to clear that up. The press release emphasizes the 285,000 on the reservation. Now we have the figure on the reservation and those who live near the reservation. That is the point we want to clear.

"Mr. Officer. The 380,000 are those who live *on or near* reservations plus the natives of Alaska.

"Mr. Denton. That does include Eskimos?

"Mr. Officer. Yes, sir.

"Mr. Denton. What do you do in places like Oklahoma, where the Indians live 'checkerboard'?

"Mr. Officer. It is for that reason that we cite figures of Indians living *on or near* reservations; because we have a number of situations similar to those in Oklahoma, where you don't have a well-

defined reservation boundary." House Hearings, Fiscal Year 1963, 87th Cong., 2d Sess., 352–354 (1962) (emphasis supplied).[19]

It is interesting to note that the Subcommittee was advised that Alaska and Oklahoma Indians are subsumed in the "on or near" category rather than placed in the pure "on" group, and, admittedly, they are entitled to general assistance. The figures stated also indicate that the number quoted the preceding year by Miss Gifford as the number "on the reservation" actually referred to those "on or near."

A nearly identical dialogue occurred in 1964 at the Senate Subcommittee:

> "Senator Bible. How many Indians do you have under your jurisdiction?
>
> "Mr. Nash. 380,000.
>
> "Senator Bible. How many nonreservation Indians do you have? Are those just reservation Indians?
>
> "Mr. Nash. These are *on or near*. This would not include, for example, Indians living in Los Angeles, San Francisco, Chicago, Denver, Minneapolis, unless they were brought there as part of our vocational training or relocation programs.
>
> "Senator Bible. What is the total Indian population in the United States?
>
> "Mr. Nash. The 1960 census counted 552,000 Indians, Eskimos, and Aleuts.

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[19] The next year the Commissioner made the following statement as to the scope of the BIA service area:

"We have a need for services for 380,000 people. This includes those who are living directly on the reservations, and those who are living *very close*, so that the way in which they live affects reservations programs. They move back and forth, et cetera. We call this our 'Federal service to Indian population' and it is larger this year than last." House Hearings, Fiscal Year 1964, 88th Cong., 1st Sess., 889 (1963) (emphasis supplied).

"Chairman Hayden. Are these full-bloods or halfs?

"Mr. Nash. The census does not make an inquiry as to full or half. They merely say, 'Are you an Indian?' 'Are you known as an Eskimo?'

"Senator Bible. Following the Chairman's question, where does your jurisdiction rest in that regard? Do you have a measuring stick?

"Mr. Nash. No, sir. Our basis for providing services to an Indian is primarily on real estate. That is, we service those individuals who reside on trust or restricted land, *or so close to it* that the program of the reservation would be affected by services not performed for that person." Senate Hearings, Fiscal Year 1965, 88th Cong., 2d Sess., 227–228 (1964) (emphasis supplied).[20]

The now-familiar BIA representations appear again at the House hearing for fiscal 1967:

"Mr. Denton. How many Indians are there on the reservations and how many are under the Indian Bureau's supervision?

"Mr. Nash. We recognize what we call the Federal Indian Service population at 380,000.

"Mr. Denton. Are they on reservations?

"Mr. Nash. This is *on and near*. The figure *on* the reservation is somewhat smaller, but this is the figure which is of those who are on reservations, are living on trust lands, have titles which are alienated,

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[20] In the formal budget presented for fiscal 1966 the Commissioner introduced his statement with the following representation:

"We are a modern service bureau, serving about 380,000 Indian persons and Alaska natives who live *on or near* reservations in 25 States. The services we perform are basically of three types." Senate Hearings, Fiscal Year 1966, 89th Cong., 1st Sess., 637 (1965) (emphasis supplied).

The third type there described consisted of welfare programs.

restricted against aliens, or are village communities in Alaska, Oklahoma, or are *so near to* reservations that they are dependent upon the facilities provided by the Bureau of Indian Affairs for their major community services.

. . . . . .

"Mr. Denton. What is the total Indian population?

"Mr. Nash. The 1960 census counted 552,000. It would be from there up, because there are a good many people who——

"Mr. Denton. And 380,000 are on the reservations, so about 170,000 are not under the Government's care.

"Mr. Nash. That is correct." House Hearings, Fiscal Year 1967, 89th Cong., 2d Sess., 370–371 (1966) (emphasis supplied).

At the hearing for fiscal 1968, the appropriation year directly at issue, Commissioner Bennett made like representations to the Senate Subcommittee. These could have led Congress to believe that there are only two relevant classes of Indians so far as non-land-related BIA services are concerned, those living "off" the reservation and those living "on or near":

"Senator Bible. . . . Mr. Commissioner, and I am sorry because you may have covered this in earlier questioning, but what is the total Indian population under your jurisdiction at the present time?

"Mr. Bennett. The total Indian population under our jurisdiction at the present time is 380,000. These are *on or near* reservations and comprise our service population based on the 1960 census.

"Senator Bible. How many Indians do we have in the United States who are not under your jurisdiction and are not your responsibility?

> "Mr. Bennett. Based on the 1960 census again the figure is about 170,000. These are people who moved away from the residential areas and generally have become a part of other communities." Senate Hearings, Fiscal Year 1968, 90th Cong., 1st Sess., 819 (1967) (emphasis supplied).[21]

Another recurring representation made by the BIA throughout the annual hearings is that whenever it was asked about those Indians who were outside the agency's service area, that is, "off" the reservations, the answer would refer to Indians who had left the reservations and moved to urban areas or who had attempted to be assimilated by the general population. Certainly, none of the references to those outside the service area seem appropriately applied to Indians of the Ruiz class.

During the fiscal 1950 Senate hearing, when the question arose as to the status of Indians who had left the reservation, Assistant Commissioner Zimmerman stated:

> "Frankly, it has not been considered the obligation of the Indian Service in the years past to police Indians after they have established themselves in Phoenix or Flagstaff or Grand Forks, or wherever it

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[21] The following year the Commissioner introduced his budget request with this statement:

"We are a modern service Bureau, serving as many as 400,000 Indians and Alaskan natives who live *on or near* reservations—people who find themselves isolated from the mainstream of American life—existing in poverty. In keeping with the general governmental policy of attacking the causes of poverty and the lack of salable skills, the objective of the Bureau of Indian Affairs is to coordinate Federal programs and programs of State and local agencies which will improve educational, economic, social and political opportunities of Indians." House Hearings, Fiscal Year 1969, 90th Cong., 2d Sess., 575 (1968); Senate Hearings, Fiscal Year 1969, 90th Cong., 2d Sess., 368 (1968) (emphasis supplied).

may be." Senate Hearings, Fiscal Year 1950, 81st Cong., 1st Sess., 483 (1949).

At the fiscal 1952 hearing, the following exchange between Senator Young and Commissioner Myer gives some indication of what Congress had in mind with respect to Indian beneficiaries "leaving the reservation":

> "Senator Young. . . . Is it true that, if an Indian leaves North Dakota to go out to the State of Washington to work, and if he runs out of work and runs out of money out there, . . . he is eligible for relief only if he is back on the reservation?
>
> "Mr. Myer. No. If he has established residence, he is as eligible as anyone. I do not know what the situation is in the State of Washington, but some States would require a 2-year residence; some do not.
>
> "Senator Young. Why could not an Indian get relief back there as well as on the reservation?
>
> "Mr. Myer. That presents a problem that is a matter of very basic policy. That is a matter of whether or not we are going to extend our services to Indians wherever they are and follow them around the United States as they leave the reservation with the type of service we are providing on the reservation." Senate Hearings, Fiscal Year 1952, 82d Cong., 1st Sess., 372 (1951).

The following representation by Acting Commissioner Crow to the House Subcommittee in 1961 seems to indicate that general assistance, although tied to residence, is concerned with those Indians who have not been assimilated:

> "The Bureau provides services and assists the states in furnishing services to Indians in the United States, including the natives of Alaska, in the fields of human and natural resources. This includes

among other things programs of education, welfare, law and order, and the protection, development, and management of trust property. Services are, in general, limited to those arising out of our relationship regarding trust property and to those Indian people who reside on trust or restricted land. Funds are not included in these estimates for furnishing services to Indian people who have established themselves in the general society." House Hearings, Fiscal Year 1962, 87th Cong., 1st Sess., 98 (1961).

In the fiscal 1964 hearings, Commissioner Nash made the following statements indicating that "leaving the reservation" meant something far different from moving 15 miles to a nonurban Indian village while still maintaining close ties with the native reservation:

"The 1960 census showed 552,000 Indians, Eskimos and all others, all people defined as 'Indians' by the census. This would include those who have left reservations, gone to Los Angeles, San Francisco, Denver, Chicago, because they simply answered to the census taker, 'Yes, I am an Indian,' when they asked. We do not pretend to follow those people with services wherever they go.

". . . We have a need for services for 380,000 people. This includes those who are living directly on the reservations, and those who are living *very close*, so that the way in which they live affects reservations programs." House Hearings, Fiscal Year 1964, 88th Cong., 1st Sess., 889 (1963) (emphasis supplied).

See also Senate Hearings, Fiscal Year 1967, 89th Cong., 2d Sess., 295–300 (1966).

It apparently was not until 1971, four years after the appropriation for fiscal 1968, that anyone in Congress seriously questioned the BIA as to its precise policy con-

cerning the "off-on" dichotomy. The following dialogue between Senator Bible, long a member of the Senate Subcommittee, and Commissioner Bruce is instructive:

> "Senator Bible. . . . What rule do you use to determine who is under your jurisdiction? Who is under the jurisdiction of the Bureau of Indian Affairs?
>
> "Mr. Bruce. American Indians living on reservations, one-fourth degree blood or more living in the United States and Alaska.
>
> "Senator Bible. One-fourth degree or more is one of the qualifications. They must also live on a reservation?
>
> "Mr. Bruce. *On or near.*
>
> "Senator Bible. What does the word 'near' mean?
>
> "Mr. Bruce. It is very difficult to define. *Near reservation would be a nearby community.*
>
> "Senator Bible. Well, half a mile, 1 mile, 5 miles, 100 yards? I am just trying to find out what your jurisdiction is. You have some responsibilities. Now what are you responsible for?
>
> "Mr. Bruce. They vary and that is why it is difficult to answer specifically.
>
> "Senator Bible. Well, give me the variables then. From 100 yards up to 10 miles?
>
> "Is that defined in a statute anywhere? If I was to become the Commissioner of Indian Affairs, God forbid, how would I know who I had jurisdiction over? They must make some determination.
>
> "Mr. Bruce. There is a definition for Oklahoma, and Alaska.
>
> "Senator Bible. What do your lawyers tell you? . . . Can you go into the heart of Manhattan and find some Indian with one-fourth degree of Indian blood? Do you have jurisdiction over him in the heart of Manhattan?

"Mr. Bruce. No, sir; not over Manhattan.

"Senator Bible. Well, if not over Manhattan, how about New York State? How about Troy or Syracuse or Rochester?

. . . . . .

"Senator Bible. . . . I am just trying to get the record straight to see what your responsibility is for Indians beyond the reservation. I think we are clear for the Indians on the reservation."

At this point a recess was taken and the Commissioner was instructed to present the Committee with a more precise breakdown. The dialogue continued:

"Senator Bible. Do you have a breakdown for the Indians on the reservations and the number beyond Indian reservations? Can you give me figures on that?

"Mr. Bruce. Yes.

"Senator Bible. All right. What are they?

"Mr. Bruce. 477,000 *on or near*.

"Senator Bible. 477,000 on or near, and we still don't know what near is . . . .

"Now on or near. Beyond the 477,000 Indians on reservations or near a reservation, you have no further jurisdiction over Indians?

"Mr. Bruce. That is right.

"Senator Bible. That is your total responsibility?

"Mr. Bruce. That is our total responsibility.[22]

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[22] The following additional information was supplied:

"*Population data*

"The statistical figure given for Indians living on and adjacent to reservations is based upon residence, and includes the following groups. The figures are for March 1970;

"(*a*) 306,900 Indians resident within Federal reservation boundaries, excluding Alaska and Oklahoma, which are discussed below.

"(*b*) 32,600 Indians resident nearby, who may receive services

"Senator Bible. Of the money that is in this budget, the $408 million, how much of that will be expended within the reservations and how much beyond the reservations?

"Mr. Bruce. Our total budget is to be spent for the benefit of reservation Indians.

"Senator Bible. You are still tripping me up on that on or near business. I wish you would define that."

[At this point there was an exchange as to whether BIA services extend to Indians living in Chicago and other urban areas.]

"Senator Bible. . . . Now how many urban Indians do we have?

"Mr. Bruce. We are talking about more than 250,000.

"Senator Bible. 250,000?

"Mr. Bruce. Yes.

"Senator Bible. That is over and above the 477,458?

"Mr. Bruce. That is right.

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because of their proximity and mobility. For example, Indians working in nearby towns frequently maintain close contact with reservation people and affairs; they may visit the reservation or return temporarily or permanently. Other Indians live on public domain allotments outside the reservation boundaries. The distance of such places is not spelled out, but depends on the extent of contact. Distant members of the tribe are not counted, although they may be carried on the tribal roll or the tribal census. See also comments below on the Navajo area.

"(*c*) 81,200 Indians resident in former reservation areas of Oklahoma. (This includes Osage, which has some attributes of a reservation.)

"(*d*) 56,800 Alaska natives resident in Alaska. This includes Aleuts, and Eskimos as well as Indians." Senate Hearings, Fiscal Year 1972, 92d Cong., 1st Sess., 752–753 (1971).

See n. 3, *supra*.

"Senator Bible. And these are the difficulties that you have encountered in also a rather lengthy resume of some of the services that you perform for them as to your responsibility for the 250,000.

"Where do you find these 250,000 nonreservation Indians?

"Mr. Bruce. Living in urban cities—Los Angeles, San Francisco, Chicago, St. Louis, Cleveland, Denver, Minneapolis." Senate Hearings, Fiscal Year 1972, 92d Cong., 1st Sess., 751–756 (1971).[23]

Although most of these passages refer to the BIA's overall jurisdiction and not to the scope of the general assistance program, there is nothing to indicate that general assistance would not be made available for all within the service area. Unlike programs such as law enforcement and land projects, general assistance is not tied inherently or logically to the physical boundaries of the reservation. And programs, such as relocation, that explicitly extend beyond the reservation are not limited to "on or near." So it is difficult to ascertain precisely what relevance the "on or near" category would have if it did not relate to programs such as general assistance. Nowhere in the hearings had the BIA ever indicated which non-land-oriented programs are available to those "on" as opposed to those "on or near," and the only conclusion that is to be drawn from the representations

[23] Beginning with the fiscal 1973 hearings, there appeared a wide outpouring for BIA assistance for urban Indians. In the Appropriations Committee Report to the Senate for fiscal 1973, submitted by Senator Bible, the following language appears, indicating the Senate's earlier understanding that although the BIA program did not cover urban Indians, it did cover those "on or near" the reservations:

"The Committee directs that the Secretary prepare a plan to assure Bureau of Indian Affairs type services to all Indians in the United States—rather than just to those living 'on or near reservations.'" S. Rep. No. 92-921, p. 6 (1972).

to Congress is that those Indians who fit the "on or near" category are eligible for all BIA services not directly tied to the physical boundaries.

Thus, the usual practice of the BIA has been to represent to Congress that "on or near" is the equivalent of "on" for purposes of welfare service eligibility, and that the successive budget requests were for a universe of Indians living "on or near" and not just for those living directly "on." In addition, the BIA has continually treated persons "off" the reservations as not "on or near." In the light of this rather consistent legislative history, it is understandable that the Secretary now argues that general assistance has not been available to those "off" the reservation. We do not accept the argument, however, that the history indicates that general assistance was thereby restricted to those within the physical boundaries. To the contrary, that history clearly shows that Congress was led to believe that the programs were being made available to those unassimilated needy Indians living *near* the reservation as well as to those living "on." Certainly, a fair reading of the congressional proceedings up to and including the fiscal 1968 hearing can lead only to the conclusion that Indians situated near the reservation, such as the Ruizes, were covered by the authorization.[24]

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[24] This conception as to the BIA's jurisdiction seems not to have been limited to Congress. Curiously enough, in the application, filed with this Court, for an extension of time within which to file the petition for certiorari in this case, the Solicitor General thus described the litigation:

"The court of appeals has held in this case that Indian welfare benefits administered by the Department of the Interior under the Snyder Act of 1921, 25 U. S. C. 13, must be provided not only to Indians living *on or near* reservations, as has been the practice of the Department of the Interior for many years, but must also be made available to Indians residing anywhere in the country" (emphasis supplied).

D. Wholly aside from this appropriation subcommittee legislative history, the Secretary suggests that Congress, each year since 1952, appropriated only in accord with the "on reservations" limitation contained in the BIA Manual. By legislating annually "in the light of [this] clear provision," the Secretary argues, Congress implicitly ratified the BIA policy. This argument, also, is not convincing. The limitation has not been published in the Federal Register or in the Code of Federal Regulations, and there is nothing in the legislative history to show that the Manual's provision was brought to the subcommittees' attention, let alone to the entire Congress. To assume that Congress was aware of this provision, contained only in an internally circulated BIA document, would be most strained. But, even assuming that Congress was fully cognizant of the Manual's limitation when the 1958 appropriation was made, the language of geographic restriction in the Manual must be considered in conjunction with the representations consistently made. There is no reason to assume that Congress did not equate the "on reservations" language with the "on or near" category that continuously was described as the service area. In the light of the Manual's particular inclusion of Oklahoma and Alaska off-reservation Indians, it would seem that this interpretation of the provision would have been the logical one for anyone in Congress, who in fact was aware of it, to accept.

V

A. Having found that the congressional appropriation was intended to cover welfare services at least to those Indians residing "on or near" the reservation, it does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. See *Dandridge* v. *Williams*,

397 U. S. 471 (1970); *Jefferson* v. *Hackney*, 406 U. S. 535 (1972). Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.

Assuming, *arguendo*, that the Secretary rationally could limit the "on or near" appropriation to include only the smaller class of Indians who lived directly "on" the reservation plus those in Alaska and Oklahoma, the question that remains is whether this has been validly accomplished. The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies,[25] and the power has been given explicitly to the Secretary and his delegates at the BIA.[26]

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[25] "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." 25 U. S. C. § 9. This provision relates back to the Act of June 30, 1834, § 17, 4 Stat. 738.

[26] "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U. S. C.

This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726 (1973); *Dixon* v. *United States*, 381 U. S. 68, 74 (1965); *Brannan* v. *Stark*, 342 U. S. 451 (1952), but also to employ procedures that conform to the law. See *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 764 (1969) (plurality opinion). No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds.

The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations. See generally S. Rep. No. 752, 79th Cong., 1st Sess., 12–13 (1945); H. R. Rep. No. 1980, 79th Cong., 2d Sess., 21–23 (1946). That Act states in pertinent part:

> "Each Agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> . . . . .
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general appli-

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§ 2. This relates back to the Act of July 9, 1832, § 1, 4 Stat. 564. The Snyder Act provides:

"The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate . . . ." 25 U. S. C. § 13.

> cability formulated and adopted by the agency." 5 U. S. C. § 552 (a)(1).

The sanction added in 1967 by Pub. L. 90–23, 81 Stat. 54, provides:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Ibid.*[27]

In the instant case the BIA itself has recognized the necessity of formally publishing its substantive policies and has placed itself under the structure of the APA procedures. The 1968 introduction to the Manual reads:

> "*Code of Federal Regulations:* Directives which relate to the public, including Indians, are published in the Federal Register and codified in 25 Code of Federal Regulations (25 CFR). These directives inform the public of privileges and benefits available; eligibility qualifications, requirements and procedures; and of appeal rights and procedures. They are published in accordance with rules and regulations issued by the Director of the Federal Register and the Administrative Procedure Act as amended. . . .

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[27] The House report accompanying this provision stated:

"An added incentive for agencies to publish the necessary details about their official activities in the Federal Register is the provision that no person shall be 'adversely affected' by material required to be published—or incorporated by reference—in the Federal Register but not so published." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 7 (1966). See S. Rep. No. 813, 89th Cong., 1st Sess., 6 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess., 12 (1964).

> "*Bureau of Indian Affairs Manual:* Policies, procedures, and instructions which do not relate to the public but are required to govern the operations of the Bureau are published in the Bureau of Indian Affairs Manual." 0 BIAM 1.2.

Unlike numerous other programs authorized by the Snyder Act and funded by the annual appropriations, the BIA has chosen not to publish its eligibility requirements for general assistance in the Federal Register or in the CFR. This continues to the present time.[28] The

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[28] Title 25 CFR (1973), on the subject of "Indians," contains regulations and sets forth eligibility requirements for law-and-order programs (pt. 11); care of Indian children in contract schools (pt. 22); federal schools for Indians (pt. 31); administration of educational loans, grants and other assistance for higher education (pt. 32); enrollment of Indians in public schools (pt. 33); administration of a program of vocational training for adult Indians (pt. 34); and general credit to Indians (pt. 91). The only reference to welfare activities is Subchapter D, entitled "Social Welfare" and comprising pts. 21 and 22. Part 21 relates to the program under which the Commissioner "may negotiate with State, territory, county or other Federal welfare agencies for such agencies to provide welfare services as contemplated" by 25 U. S. C. § 452. The regulations state that the program applies to "Indians residing within a particular State within the exterior boundaries of Indian reservations under the jurisdiction of the Bureau of Indian Affairs or on trust or restricted lands under the jurisdiction of the Bureau of Indian Affairs." 25 CFR § 21.1 (1973). But see 25 U. S. C. § 309 and 25 CFR § 34.3, where vocational training for adult Indians is also made available "to additional Indians who reside *near* reservations in the discretion of the Secretary of the Interior when the failure to provide the services would have a direct effect upon Bureau programs within the reservation boundaries" (emphasis supplied). See also 25 CFR § 31.1.

The phrase "within the exterior boundaries of Indian reservations under the jurisdiction of the Bureau of Indian Affairs," when read in conjunction with the BIA's declared jurisdiction before Congress, would seem to include Indians living "near" the reservations. In any event, the cited regulations do not deal with the general

only official manifestation of this alleged policy of restricting general assistance to those directly on the reservations is the material in the Manual which is, by BIA's own admission, solely an internal-operations brochure intended to cover policies that "do not relate to the public." Indeed, at oral argument the Government conceded that for this to be a "real legislative rule," itself endowed with the force of law, it should be published in the Federal Register. Tr. of Oral Arg. 20.

Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. *Service* v. *Dulles,* 354 U. S. 363, 388 (1957); *Vitarelli* v. *Seaton,* 359 U. S. 535, 539–540 (1959). The BIA, by its Manual, has declared that all directives that "inform the public of privileges and benefits available" and of "eligibility requirements" are among those to be published. The requirement that, in order to receive general assistance, an Indian must reside directly "on" a reservation is clearly an important substantive policy that fits within this class of directives. Before the BIA may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures.

The Secretary has presented no reason why the requirements of the Administrative Procedure Act could not or should not have been met. Cf. *SEC* v. *Chenery Corp.,* 332 U. S. 194, 202 (1947). The BIA itself has not attempted to defend its rule as a valid exercise of its "legislative power," but rather depends on the argument that Congress itself has not appropriated funds for

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assistance program. There is nothing in the Code indicating that a general assistance program exists, to say nothing of the absence of eligibility criteria.

Indians not directly on the reservations. The conscious choice of the Secretary not to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, renders it ineffective so far as extinguishing rights of those otherwise within the class of beneficiaries contemplated by Congress is concerned.

The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions. See, *e. g., Seminole Nation* v. *United States,* 316 U. S. 286, 296 (1942); *Board of County Comm'rs* v. *Seber,* 318 U. S. 705 (1943). Particularly here, where the BIA has continually represented to Congress, when seeking funds, that Indians living near reservations are within the service area, it is essential that the legitimate expectation of these needy Indians not be extinguished by what amounts to an unpublished *ad hoc* determination of the agency that was not promulgated in accordance with its own procedures, to say nothing of those of the Administrative Procedure Act. The denial of benefits to these respondents under such circumstances is inconsistent with "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation* v. *United States,* 316 U. S., at 296; see *Squire* v. *Capoeman,* 351 U. S. 1 (1956). Before benefits may be denied to these otherwise entitled Indians, the BIA must first promulgate eligibility requirements according to established procedures.

B. Even assuming the lack of binding effect of the BIA policy, the Secretary argues that the residential restriction in the Manual is a longstanding interpretation of the Snyder Act by the agency best suited to do this, and that deference is due its interpretation. See *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 433–434 (1971).

The thrust of this argument is not that the regulation itself has created the "on" and "near" distinction, but that Congress has intended to provide general assistance only to those directly on reservations, and that the Manual's provision is simply an interpretation of congressional intent. As we have already noted, however, the BIA, through its own practices and representations, has led Congress to believe that these appropriations covered Indians "on or near" the reservations, and it is too late now to argue that the words "on reservations" in the Manual mean something different from "on or near" when, in fact, the two have been continuously equated by the BIA to Congress.

We have recognized previously that the weight of an administrative interpretation will depend, among other things, upon "its consistency with earlier and later pronouncements" of an agency. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). See generally 1 K. Davis, Administrative Law Treatise §§ 5.03–5.06 (1958 ed. and Supp. 1970). In this instance the BIA's somewhat inconsistent posture belies its present assertion. In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose. *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969). It is evident to us that Congress did not itself intend to limit its authorization to only those Indians directly on, in contrast to those "near," the reservation, and that, therefore, the BIA's interpretation must fail.

We emphasize that our holding does not, as was suggested at oral argument, Tr. of Oral Arg. 3, 5, and in the Brief for Petitioner 2, make general assistance available to all Indians "throughout the country." Even respondents do not claim this much. Brief for Respondents 23;

Tr. of Oral Arg. 28. The appropriation, as we see it, was for Indians "on or near" the reservation. This is broad enough, we hold, to include the Ruizes who live where they found employment in an Indian community only a few miles from their reservation, who maintain their close economic and social ties with that reservation, and who are unassimilated. The parameter of their class will be determined, to the extent necessary, by the District Court on remand of the case. Whether other persons qualify for general assistance will be left to cases that arise in the future.

In view of our disposition of the statutory issue, we do not reach the respondents' constitutional arguments. We intimate no views as to them.

The judgment of the Court of Appeals is affirmed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES *v.* KAHAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73–428. Decided February 25, 1974

At respondent's arraignment for improperly receiving gratuities for official acts and for perjury before the grand jury, counsel was appointed to represent him at his request and after he stated he was without funds; he failed, in response to a question as to whether he had funds to employ an attorney, to disclose that he had access to certain savings accounts in which he had deposited $27,000. On trial, his statements as to lack of funds were admitted as false exculpatory statements evincing his consciousness that the bank deposits were incriminating, and as evidence of willfulness in making statements before the grand jury with knowledge of their falsity. The Court of Appeals, in reliance on *Simmons* v. *United States,* 390 U. S. 377, reversed, holding that the admission of the false statements violated respondent's Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. *Held:* The incriminating component of respondent's pretrial statements derives, not from their content, but from his knowledge of their falsity, the truth of the matter being that he knew he was not indigent and did not have a right to the appointment of counsel. Nor is there involved what was "believed" by the claimant to be a "valid" constitutional claim, hence respondent was not faced with the "intolerable" choice of having to surrender one constitutional right in order to assert another. *Simmons* v. *United States, supra,* distinguished.

Certiorari granted; 479 F. 2d 290, reversed and remanded.

PER CURIAM.

Respondent, a former Immigration inspector, was convicted by a jury in the District Court of numerous counts under a multiple-count indictment; the conviction covered 20 counts of improperly receiving gratuities for official acts, in violation of 18 U. S. C. § 201 (g), and one of perjury before the grand jury, in violation of 18 U. S. C.

§ 1623, arising out of a scheme to defraud nonresident aliens and the Immigration and Naturalization Service. The Court of Appeals reversed respondent's conviction and remanded the case for retrial. 479 F. 2d 290 (CA2 1973). Respondent's motion to proceed *in forma pauperis* in this Court, and the petition for a writ of certiorari, are granted. The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for reinstatement of the judgment of conviction.

At respondent's arraignment, counsel was appointed under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A (b), to represent him after he requested the appointment and stated that he was without funds. In response to a direct question as to whether he had funds to employ an attorney, he failed to disclose that he had access to and control of four savings accounts in which he had deposited approximately $27,000 during 1970 and 1971,[1]

[1] The transcript of the colloquy at arraignment reads in part as follows:

"The Court: Your name, sir?

"The Defendant: I am Norbert Kahan, sir.

"The Court: Have you an attorney?

"The Defendant: No, sir.

"The Court: Have you any money to hire an attorney?

"The Defendant: I do, sir, but it's blocked by my wife from whom I am divorced.

"The Court: Do you want a week to try and straighten that out?

"The Defendant: There is a suit coming up sometime early next year.

"The Court: We can't wait until next year.

"The Defendant: Then if it pleases the Court I would like to have the Court assign me an attorney.

"The Court: You have no current funds?

"The Defendant: I beg your pardon?

"The Court: You have no current funds at all?

"The Defendant: No, sir.

"The Court: Are you working?

[*Footnote 1 continued on p. 241*]

and from which he made frequent withdrawals immediately subsequent to the arraignment. The accounts were apparently established by respondent in so-called "Totten trusts" for his children as the intended donees; under New York law these trusts were revocable at respondent's will. *In re Totten,* 179 N. Y. 112, 71 N. E. 748 (1904). The deposits to these undisclosed accounts aggregated more than the $25,000 which respondent reported as his total legitimate income on his tax returns for 1970 and 1971, and evidence of the deposits was admitted at trial as supporting the inference that he improperly received the gratuities as was charged. As part of the Government's case in chief the District Court admitted evidence of respondent's statements to the court as to his lack of funds.[2] The statements were admitted as false exculpatory statements evincing respondent's consciousness that the bank deposits were incriminating, and as evidence of willfulness in making statements before the grand jury with knowledge of their falsity.

The Court of Appeals held that the admission of respondent's false statements violated his Fifth Amendment privilege against compulsory self-incrimination and

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"The Defendant: No, sir.

"The Court: I'm going to assign Mr. Jesse Berman at this point."

At trial it was determined that respondent never made these averments under oath, either orally or by presentment of written affidavit.

[2] Respondent contended at trial that he understood himself to be merely the custodian of the four "Totten trusts," which he said belonged to his children. The trial judge ruled, out of the jury's presence, that there was sufficient proof of falsity to warrant the admission of his statements, that the false statements were relevant to issues on trial, and that the prejudicial effect of the statements did not outweigh their probative value. The jury was ultimately instructed that it should consider respondent's false statements only for the limited purposes, as set forth in text, for which they were introduced.

his Sixth Amendment right to counsel because in its view the "ultimate truth of the matter asserted in the pretrial request for appointed counsel is of no moment. *See* Simmons v. United States, 390 U. S. 377." 479 F. 2d, at 292. The Court of Appeals cited *United States* v. *Branker,* 418 F. 2d 378 (CA2 1969), for its application of *Simmons* v. *United States,* 390 U. S. 377 (1968), to the assertion of the Sixth Amendment right. The Court of Appeals' reliance on *Simmons* misconceives the thrust of that holding.

In *Simmons* one of the defendants, in an attempt to establish standing to move for suppression of a suitcase containing incriminating evidence seized by the police, testified at the pretrial suppression hearing that the suitcase was similar to one he owned. The motion to suppress was denied, and the Government used the defendant's testimony against him in its case in chief. Viewing the testimony as an "integral part" of the claim for exclusion, the Court held its use impermissible because it conditioned the exercise of what the defendant "believed . . . to be a valid Fourth Amendment claim" on a waiver of the constitutional privilege against compulsory self-incrimination. *Id.,* at 391, 394.

To establish standing to move for suppression of evidence assertedly illegally seized, the claimant must show the kind of interest in that evidence set forth in *Brown* v. *United States,* 411 U. S. 223, 229–230 (1973), which would necessarily be incriminating should the motion fail and the defendant's interest therein be introduced. The need to choose between waiving the Fifth Amendment privilege and asserting an incriminating interest in evidence sought to be suppressed, or invoking the privilege but thereby forsaking the claim for exclusion, creates what the Court characterized as an "intolerable" need to surrender one constitutional right in order to assert another. *Simmons,* 390 U. S., at 394.

Even assuming that the *Simmons* principle was appropriately extended to Sixth Amendment claims for appointed counsel by the *Branker* holding, a question which we do not now decide, cf. *McGautha* v. *California*, 402 U. S. 183, 210–213 (1971), that principle cannot be applied to protect respondent here. *Simmons* barred the use of pretrial testimony at trial to prove its incriminating content. Here, by contrast, the incriminating component of respondent's pretrial statements derives not from their content, but from respondent's knowledge of their falsity.[3] The truth of the matter was that respondent was not indigent, and did not have a right to appointment of counsel under the Sixth Amendment. We are not dealing, as was the Court in *Simmons*, with what was "believed" by the claimant to be a "valid" constitutional claim, see n. 2, *supra*. Respondent was not, therefore, faced with the type of intolerable choice *Simmons* sought to relieve. The protective shield of *Simmons* is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood. Cf. *Harris* v. *New York*, 401 U. S. 222, 226 (1971).

Reversed and remanded.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Mr. Justice Harlan speaking for the Court in *Simmons* v. *United States*, 390 U. S. 377, 394, said: "[W]e find it intolerable that one constitutional right should have to

[3] The grounds for admitting respondent's false statements, *supra*, at 241, make it clear by necessary implication that the trial judge—who alone decides the question of relevancy—thought respondent had willfully made false representations. Respondent's withdrawals from the aforementioned accounts shortly after he denied having current funds lend support to that view.

be surrendered in order to assert another." In that case an accused testified on a motion to suppress evidence in order to protect his Fourth Amendment rights but later discovered that the testimony would be used by the prosecution against him. We held that the testimony the defendant gave on a motion to suppress evidence on Fourth Amendment grounds was not admissible against him at trial on the issue of guilt "unless he makes no objection." *Ibid.*

If an accused in order to protect his Fourth Amendment right gives testimony that is protected by the Self-Incrimination Clause of the Fifth Amendment, I fail to see how testimony protective of Sixth Amendment rights is on a lower level. In *United States* v. *Jackson*, 390 U. S. 570, we held unenforceable provisions of a federal act which made the death penalty applicable only to those who contested their guilt before a jury. The "inevitable effect" in that case was "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.*, at 581.

The suggestion that no Sixth Amendment right existed in this case does not find support in the record. There is no finding as to the amount of the funds restricted and beyond the reach of the respondent, or as to what free funds he actually had or as to what were his obligations. Yet all of these facts would be necessary before we could reach that conclusion. This Court in passing on applications to proceed *in forma pauperis* looks not only to what the applicant's income and/or cash position is but what his periodic liabilities are. Thus a person with an income of $600 a month has been allowed to proceed *in forma pauperis* where his present obligations consume his entire income. The mere fact that one has money in the bank is therefore not enough

to make frivolous his claim of indigency for purposes of *in forma pauperis*. We may not therefore responsibly say there was no genuine Sixth Amendment right to counsel in this case.

Moreover, whether one has a bona fide claim to appointed counsel is a legal point which laymen should not have to determine before they may speak without fear. The funds here involved were in Totten trusts and Kahan thought that he had no access to them under the law. One should not have to seek advice on points of law nor have an audit conducted on his personal finances before he feels free to assert his Sixth Amendment rights. Statements made in good faith may later turn out to be false and all those who utter the statements run the risk that they may not be able to convince others of their sincerity. If "tension" between the Sixth and Fifth Amendments arises only when judges, with the benefit of hindsight and legal acumen not possessed by the defendant, later determine the Sixth Amendment claim to be "bona fide," many indigents with legitimate claims to appointed counsel will hesitate to speak freely in asserting the claim. As the court below phrased it, the defendant will be "forced to gamble his right to remain silent against his need for counsel or his understanding of the requirements for appointment of counsel." 479 F. 2d 290, 292.

The principle of *Simmons* and *Jackson* is applicable, if reason is to prevail, where rights under the Fifth Amendment are entangled with rights under either the Fourth or the Sixth Amendment. There is such entanglement here, for the Fifth Amendment is as applicable to evidence concerning crimes with which the accused has not yet been charged as it is to evidence concerning crimes already charged. That was so held

by a unanimous Court in *Counselman* v. *Hitchcock*, 142 U. S. 547, 562:

> "It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case against himself; but such is not the language of the Constitution. Its provision is that no person shall be compelled in *any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case."

The Court of Appeals was correct in its application of this issue and I would affirm.

MR. JUSTICE MARSHALL, dissenting.

As the Court's *per curiam* opinion indicates, there is a tension between the Sixth Amendment right to ap-

pointed counsel for indigent defendants and the Fifth Amendment comparable to the tension between the Fourth and Fifth Amendments recognized in *Simmons* v. *United States,* 390 U. S. 377 (1968). The situation presented in *United States* v. *Branker,* 418 F. 2d 378 (CA2 1969), is instructive. There, in truthfully revealing his financial situation at the pretrial indigency hearing, the defendant disclosed that he had received $250 from a coconspirator. In order to assert his Sixth Amendment right to counsel, in other words, he was forced to provide potentially incriminating evidence.

As I view the matter, this tension between the Fifth and Sixth Amendments could be resolved in one of two ways. The first alternative is to permit the defendant seeking counsel as an indigent to lie about his financial situation wherever the truth might be incriminating. As a second alternative, we could require the defendant seeking appointment of counsel to tell the truth at the indigency hearing, and subject him to sanctions for his willful and knowing failure to do so, but bar use of any incriminating information so revealed.

I, for one, do not consider the first alternative to be acceptable. Nor did the Court of Appeals in this case, for it conceded that if the defendant willfully misrepresented his assets at the pretrial hearing, he could be prosecuted for perjury or false statement. 479 F. 2d 290, 292 n. 3 (CA2 1973). See, *e. g., United States* v. *Birrell,* 470 F. 2d 113 (CA2 1972). Likewise, respondent's Memorandum in Opposition disclaims any "right to lie" at the pretrial hearing.

In view of its concession that the defendant can be penalized for willfully and knowingly falsifying information at a pretrial suppression hearing, I cannot understand the Court of Appeals' conclusion that this sanction can only take the form of a separate prosecution for per-

jury. If the defendant's willfully false statement can be used against him at a subsequent perjury trial, I see no reason why it cannot be used against him at his pending criminal trial.

My Brother DOUGLAS raises the possibility that a defendant will fail to exercise his Sixth Amendment rights for fear that a court may later find the Sixth Amendment claim not bona fide or his statements not made in good faith. This reasoning would not only control the present case, however, but would also bar the Government from bringing a perjury prosecution against a defendant who knowingly and willfully lies under oath at his pretrial hearing. For it could likewise be argued that a defendant will fail to exercise his Sixth Amendment rights for fear that a jury may later determine that he committed perjury at the indigency hearing.

The problem is not a frivolous one, but its solution does not lie, in my view, in permitting the defendant to perjure himself and remain free from sanction. Rather, it lies in procedures to ensure that the imposition of sanctions in appropriate cases will not in fact discourage good-faith assertions of Sixth Amendment claims. With respect to a subsequent perjury prosecution, the discouragement of legitimate Sixth Amendment claims is minimized by the requirement that the Government convince a jury that the defendant willfully and knowingly gave false testimony. I would provide a similar protection where the Government seeks to use a defendant's allegedly false pretrial statement as evidence against him at his pending criminal trial. Where such statement was purportedly given in furtherance of a Sixth Amendment right, I would bar the Government from introducing it in evidence unless the Government proved and the trial court found that the defendant had knowingly and willfully provided false information.

The solution, then, to the tension between the Fifth and Sixth Amendments is to require the defendant seeking appointment of counsel to tell the truth at his indigency hearing, and to bar use of any incriminating information so revealed. This approach is fully consistent with our Fifth Amendment cases. "[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Lefkowitz* v. *Turley*, 414 U. S. 70, 78 (1973). Where the Government requires the defendant to speak in order to assert his Sixth Amendment rights, it must shelter him with the immunity provided by the Fifth Amendment for such compelled testimony. Cf. *United States* v. *Branker, supra.*

Applying these principles to the present case, I believe respondent's conviction was properly reversed by the Court of Appeals. At trial, Kahan claimed to have understood that the Totten trust accounts he opened belonged to his children, with himself merely the custodian. See 479 F. 2d, at 292 n. 3 and 296 n. 3. The District Court never made a finding, before admitting evidence of Kahan's pretrial statements, that Kahan had willfully misrepresented his financial situation and in fact knew that the funds in the Totten trusts were his. The court found sufficient proof that the statements were false to warrant their admission, but this finding does not satisfy the test I would apply. The mere fact that a false statement was made is not enough. Statements which turn out to be false are often made in the good-faith but mistaken belief they are correct, cf. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and we should be cautious not to penalize good-faith assertions of Sixth Amendment rights.

I would affirm the judgment of the Court of Appeals.

MEMORIAL HOSPITAL ET AL. *v.* MARICOPA COUNTY ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA

No. 72-847. Argued November 6, 1973—
Decided February 26, 1974

This is an appeal from a decision of the Arizona Supreme Court upholding the constitutionality of an Arizona statute requiring a year's residence in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care at the county's expense. *Held:* The durational residence requirement, in violation of the Equal Protection Clause, creates an "invidious classification" that impinges on the right of interstate travel by denying newcomers "basic necessities of life." *Shapiro* v. *Thompson*, 394 U. S. 618. Pp. 253-270.

(a) Such a requirement, since it operates to penalize indigents for exercising their constitutional right of interstate migration, must be justified by a compelling state interest. *Shapiro* v. *Thompson, supra; Dunn* v. *Blumstein*, 405 U. S. 330. Pp. 253-262.

(b) The State has not shown that the durational residence requirement is "legitimately defensible" in that it furthers a compelling state interest, and none of the purposes asserted as justification for the requirement—fiscal savings, inhibiting migration of indigents generally, deterring indigents from taking up residence in the county solely to utilize the medical facilities, protection of longtime residents who have contributed to the community particularly by paying taxes, maintaining public support of the county hospital, administrative convenience in determining bona fide residence, prevention of fraud, and budget predictability—satisfies the State's burden of justification and insures that the State, in pursuing its asserted objectives, has chosen means that do not unnecessarily impinge on constitutionally protected interests. Pp. 262-269.

108 Ariz. 373, 498 P. 2d 461, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and POWELL, JJ., joined. BURGER, C. J., and BLACKMUN, J., concurred in the result. DOUGLAS, J., filed a separate

opinion, *post*, p. 270. REHNQUIST, J., filed a dissenting opinion, *post*, p. 277.

Mary M. Schroeder argued the cause for appellants. With her on the brief was *John P. Frank*.

William J. Carter III argued the cause and filed a brief for appellees.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents an appeal from a decision of the Arizona Supreme Court upholding an Arizona statute requiring a year's residence in a county as a condition to receiving nonemergency hospitalization or medical care at the county's expense. The constitutional question presented is whether this durational residence requirement is repugnant to the Equal Protection Clause as applied by this Court in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

I

Appellant Henry Evaro is an indigent suffering from a chronic asthmatic and bronchial illness. In early June 1971, Mr. Evaro moved from New Mexico to Phoenix in Maricopa County, Arizona. On July 8, 1971, Evaro had a severe respiratory attack and was sent by his attending physician to appellant Memorial Hospital, a nonprofit private community hospital. Pursuant to the Arizona statute governing medical care for indigents, Memorial notified the Maricopa County Board of Supervisors that it had in its charge an indigent who might qualify for county care and requested that Evaro be transferred to the County's public hospital facility. In accordance with the approved procedures, Memorial also

**Sandor O. Shuch* and *John J. Relihan* filed a brief for the Legal Aid Society of Maricopa County as *amicus curiae* urging reversal.

claimed reimbursement from the County in the amount of $1,202.60, for the care and services it had provided Evaro.

Under Arizona law, the individual county governments are charged with the mandatory duty of providing necessary hospital and medical care for their indigent sick.[1] But the statute requires an indigent to have been a resident of the County for the preceding 12 months in order to be eligible for free nonemergency medical care.[2] Maricopa County refused to admit Evaro to its public hospital or to reimburse Memorial solely because Evaro had not been a resident of the County for the preceding year. Appellees do not dispute that Evaro is an indigent or that he is a bona fide resident of Maricopa County.[3]

This action was instituted to determine whether appellee Maricopa County was obligated to provide medical care for Evaro or was liable to Memorial for the costs it incurred because of the County's refusal to do so. This controversy necessarily requires an adjudication of the constitutionality of the Arizona dura-

[1] Ariz. Rev. Stat. Ann. § 11-291 (Supp. 1973-1974).

[2] Section 11-297A (Supp. 1973-1974) provides in relevant part that:

"Except in emergency cases when immediate hospitalization or medical care is necessary for the preservation of life or limb no person shall be provided hospitalization, medical care or outpatient relief under the provisions of this article without first filing with a member of the board of supervisors of the county in which he resides a statement in writing, subscribed and sworn to under oath, that he is an indigent as shall be defined by rules and regulations of the state department of economic security, an unemployable totally dependent upon the state or county government for financial support, or an employable of sworn low income without sufficient funds to provide himself necessary hospitalization and medical care, *and that he has been a resident of the county for the preceding twelve months.*" (Emphasis added.)

[3] Thus, the question of the rights of transients to medical care is not presented by this case.

tional residence requirement for providing free medical care to indigents.

The trial court held the residence requirement unconstitutional as a violation of the Equal Protection Clause. In a prior three-judge federal court suit against Pinal County, Arizona, the District Court had also declared the residence requirement unconstitutional and had enjoined its future application in Pinal County. *Valenciano* v. *Bateman*, 323 F. Supp. 600 (Ariz. 1971).[4] Nonetheless, the Arizona Supreme Court upheld the challenged requirement. To resolve this conflict between a federal court and the highest court of the State, we noted probable jurisdiction, 410 U. S. 981 (1973), and we reverse the judgment of the Arizona Supreme Court.

II

In determining whether the challenged durational residence provision violates the Equal Protection Clause, we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.[5] The Court considered similar durational

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[4] Arizona's intermediate appellate court had also declared the durational residence requirement unconstitutional in *Board of Supervisors, Pima County* v. *Robinson*, 10 Ariz. App. 238, 457 P. 2d 951 (1969), but its decision was vacated as moot by the Arizona Supreme Court. 105 Ariz. 280, 463 P. 2d 536 (1970).

An Arizona one-year durational residence requirement for care at state mental health facilities was declared unconstitutional in *Vaughan* v. *Bower*, 313 F. Supp. 37 (Ariz.), aff'd, 400 U. S. 884 (1970). See n. 11, *infra*.

A Florida one-year durational residence requirement for medical care at public expense was found unconstitutional in *Arnold* v. *Halifax Hospital Dist.*, 314 F. Supp. 277 (MD Fla. 1970), and *Crapps* v. *Duval County Hospital Auth.*, 314 F. Supp. 181 (MD Fla. 1970).

[5] *E. g.*, *Weber* v. *Aetna Cas. & Surety Co.*, 406 U. S. 164, 173 (1972); *Dunn* v. *Blumstein*, 405 U. S. 330, 335 (1972).

residence requirements for welfare assistance in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). The Court observed that those requirements created two classes of needy residents "indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class [was] granted and second class [was] denied welfare aid upon which may depend the ability . . . to obtain the very means to subsist—food, shelter, and other necessities of life." *Id.*, at 627. The Court found that because this classification impinged on the constitutionally guaranteed right of interstate travel, it was to be judged by the standard of whether it promoted a compelling state interest.[6] Finding such an interest wanting, the Court held the challenged residence requirements unconstitutional.

Appellees argue that the residence requirement before us is distinguishable from those in *Shapiro*, while appellants urge that *Shapiro* is controlling. We agree with appellants that Arizona's durational residence requirement for free medical care must be justified by a compelling state interest and that, such interests being lacking, the requirement is unconstitutional.

III

The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.[7] Whatever

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[6] 394 U. S., at 634. See also *id.*, at 642–644 (STEWART, J., concurring).

[7] *Dunn* v. *Blumstein*, *supra*; *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); see *Wyman* v. *Lopez*, 404 U. S. 1055 (1972); *Oregon* v. *Mitchell*, 400 U. S. 112, 237 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.), 285–286 (STEWART, J., concurring and dissenting, with whom BURGER, C. J., and BLACKMUN, J., joined);

its ultimate scope, however, the right to travel was involved in only a limited sense in *Shapiro*. The Court was there concerned only with the right to migrate, "with intent to settle and abide" [8] or, as the Court put it, "to migrate, resettle, find a new job, and start a new life." *Id.*, at 629. Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement. But, in *Shapiro*, the Court explained that "[t]he residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites" for assistance and only the latter was held to be unconstitutional. *Id.*, at 636. Later, in invalidating a durational residence requirement for voter registration on the basis of *Shapiro*, we cautioned that our decision was not intended to "cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements." *Dunn* v. *Blumstein*, 405 U. S. 330, 342 n. 13 (1972).

IV

The appellees argue that the instant county residence requirement is distinguishable from the state residence requirements in *Shapiro*, in that the former penalizes, not interstate, but rather intrastate, travel. Even were we to draw a constitutional distinction between interstate and

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Wyman v. *Bowens*, 397 U. S. 49 (1970); *United States* v. *Guest*, 383 U. S. 745, 757–759 (1966); cf. *Griffin* v. *Breckenridge*, 403 U. S. 88, 105–106 (1971); *Demiragh* v. *DeVos*, 476 F. 2d 403 (CA2 1973). See generally Z. Chafee, Three Human Rights in the Constitution of 1787, pp. 171–181, 187 *et seq.* (1956).

[8] See *King* v. *New Rochelle Municipal Housing Auth.*, 442 F. 2d 646, 648 n. 5 (CA2 1971); *Cole* v. *Housing Authority of the City of Newport*, 435 F. 2d 807, 811 (CA1 1970); *Wellford* v. *Battaglia*, 343 F. Supp. 143, 147 (Del. 1972); cf. *Truax* v. *Raich*, 239 U. S. 33, 39 (1915); Note, *Shapiro* v. *Thompson:* Travel, Welfare and the Constitution, 44 N. Y. U. L. Rev. 989, 1012 (1969).

intrastate travel, a question we do not now consider, such a distinction would not support the judgment of the Arizona court in the case before us. Appellant Evaro has been effectively penalized for his interstate migration, although this was accomplished under the guise of a county residence requirement. What would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction. The Arizona Supreme Court could have construed the waiting-period requirements to apply to intrastate but not interstate migrants; [9] but it did not do so, and "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974).

V

Although any durational residence requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such a requirement to be *per se* unconstitutional. The Court's holding was conditioned, 394 U. S., at 638 n. 21, by the caveat that some "waiting-period *or* residence requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel." The amount of impact required to give

[9] Appellees argue that the County should be able to apply a durational residence requirement to preserve the quality of services provided its longtime residents because of their ties to the community and the previous contributions they have made, particularly through past payment of taxes. It would seem inconsistent to argue that the residence requirement should be construed to bar longtime Arizona residents, even if unconstitutional as applied to persons migrating into Maricopa County from outside the State. Surely, longtime residents of neighboring counties have more ties with Maricopa County and equity in its public programs, as through past payment of state taxes, than do migrants from distant States. This "contributory" rationale is discussed, *infra*, at 266.

rise to the compelling-state-interest test was not made clear.[10] The Court spoke of the requisite impact in two ways. First, we considered whether the waiting period would deter migration:

> "An indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute." *Id.*, at 629.

Second, the Court considered the extent to which the residence requirement served to *penalize* the exercise of the right to travel.

The appellees here argue that the denial of nonemergency medical care, unlike the denial of welfare, is not apt to deter migration; but it is far from clear that the challenged statute is unlikely to have any deterrent effect. A person afflicted with a serious respiratory ailment, particularly an indigent whose efforts to provide a living for his family have been inhibited by his incapacitating illness, might well think of migrating to the clean dry air of Arizona, where relief from his disease could also bring relief from unemployment and poverty. But he may hesitate if he knows that he must make the move without the possibility of falling back on the State for medical care should his condition still plague him or grow more severe during his first year of residence.

It is true, as appellees argue, that there is no evidence in the record before us that anyone was actually deterred from traveling by the challenged restriction. But neither did the majority in *Shapiro* find any reason "to dispute the 'evidence that few welfare recipients have in fact been

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[10] For a discussion of the problems posed by this ambiguity, see Judge Coffin's perceptive opinion in *Cole* v. *Housing Authority of the City of Newport*, 435 F. 2d 807 (CA1 1970).

deterred [from moving] by residence requirements.' Indeed, none of the litigants had themselves been deterred." *Dunn,* 405 U. S., at 340 (citations omitted). An attempt to distinguish *Shapiro* by urging that a durational residence requirement for voter registration did not deter travel, was found to be a "fundamental misunderstanding of the law" in *Dunn, supra,* at 339–340: [11]

> "*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to *penalize* the exercise of that right [to travel] . . . .'" (Emphasis in original; footnote omitted.)

Thus, *Shapiro* and *Dunn* stand for the proposition that a classification which "operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration," must be justified by a compelling state interest. *Oregon* v. *Mitchell,* 400 U. S. 112, 238 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.) (emphasis added). Although any durational residence requirement imposes a potential cost on migration, the Court in *Shapiro* cautioned that some

[11] In *Vaughan* v. *Bower,* 313 F. Supp. 37 (Ariz.), aff'd, 400 U. S. 884 (1970), a federal court struck down an Arizona law permitting the director of a state mental hospital to return to the State of his prior residence, any indigent patient who had not been a resident of Arizona for the year preceding his civil commitment. It is doubtful that the challenged law could have had any deterrent effect on migration, since few people consider being committed to a mental hospital when they decide to take up residence in a new State. See also *Affeldt* v. *Whitcomb,* 319 F. Supp. 69 (ND Ind. 1970), aff'd, 405 U. S. 1034 (1972).

"waiting-period[s] . . . may not be penalties." 394 U. S., at 638 n. 21. In *Dunn* v. *Blumstein, supra,* the Court found that the denial of the franchise, "a fundamental political right," *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964), was a penalty requiring application of the compelling-state-interest test. In *Shapiro,* the Court found denial of the basic "necessities of life" to be a penalty. Nonetheless, the Court has declined to strike down state statutes requiring one year of residence as a condition to lower tuition at state institutions of higher education.[12]

Whatever the ultimate parameters of the *Shapiro* penalty analysis,[13] it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance.[14] And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. See, *e. g., Shapiro, supra; Goldberg* v. *Kelly,* 397 U. S. 254, 264 (1970); *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 340–342 (1969). It would be odd, indeed, to find that the State of Arizona was required to afford Evaro welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the

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[12] See *Vlandis* v. *Kline,* 412 U. S. 441, 452–453, n. 9 (1973).

[13] For example, the *Shapiro* Court cautioned that it meant to "imply no view of the validity of waiting-period *or* residence requirements determining eligibility [*inter alia*] to obtain a license to practice a profession, to hunt or fish, and so forth." 394 U. S., at 638 n. 21.

[14] Dept. of Health, Education, and Welfare (HEW) Report on Medical Resources Available to Meet the Needs of Public Assistance Recipients, House Committee on Ways and Means, 86th Cong., 2d Sess., 74 (Comm. Print 1961). Similarly, President Nixon has observed: "'It is health which is real wealth,' said Ghandi, 'and not pieces of gold and silver.'" Health, Message from the President, 92d Cong., 1st Sess., H. R. Doc. No. 92–49, p. 18 (1971). See also materials cited at n. 4, *supra.*

medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.[15]

Nor does the fact that the durational residence requirement is inapplicable to the provision of emergency medical care save the challenged provision from constitutional doubt. As the Arizona Supreme Court observed, appellant "Evaro was an indigent person who *required* continued medical care for the preservation of his health and well being . . . ," even if he did not require immediate emergency care.[16] The State could not deny Evaro care

[15] Reference to the tuition cases is instructive. The lower courts have contrasted in-state tuition with "necessities of life" in a way that would clearly include medical care in the latter category. The District Court in *Starns* v. *Malkerson*, 326 F. Supp. 234, 238 (Minn. 1970), aff'd, 401 U. S. 985 (1971), quoted with approval from *Kirk* v. *Board of Regents*, 273 Cal. App. 2d 430, 440, 78 Cal. Rptr. 260, 266–267 (1969), appeal dismissed, 396 U. S. 554 (1970) (emphasis added):

" 'While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro involved the immediate and pressing need for preservation of life and health* of persons unable to live without public assistance, and their dependent children. Thus, the residence requirement in *Shapiro* could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning [does] not involve similar risks. Nor was petitioner . . . precluded from the benefit of obtaining higher education. Charging higher tuition fees to non-resident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents.' "

See also Note, The Constitutionality of Nonresident Tuition, 55 Minn. L. Rev. 1139, 1149–1158 (1971). Moreover, in *Vlandis, supra,* the Court observed that "special problems [are] involved in determining the bona fide residence of college students who come from out of State to attend [a] public university . . . ," since those students are characteristically transient, 412 U. S., at 452. There is no such ambiguity about whether appellant Evaro is a bona fide resident of Maricopa County.

[16] 108 Ariz. 373, 374, 498 P. 2d 461, 462 (emphasis added).

just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioriation in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.[17]

Finally, appellees seek to distinguish *Shapiro* as involving a partially federally funded program. Maricopa County has received federal funding for its public hospital[18] but, more importantly, this Court has held that whether or not a welfare program is federally funded is irrelevant to the applicability of the *Shapiro* analysis. *Pease* v. *Hansen*, 404 U. S. 70 (1971); *Graham* v. *Richardson*, 403 U. S. 365 (1971).

Not unlike the admonition of the Bible that, "Ye shall have one manner of law, as well for the stranger, as for one of your own country," Leviticus 24:22 (King James Version), the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents. The State of Arizona's durational residence requirement for free medical care penalizes indigents for exercising their right to migrate

[17] See *Valenciano* v. *Bateman*, 323 F. Supp. 600, 603 (Ariz. 1971). See generally HEW Report on Medical Resources, *supra*, n. 14, at 73–74; Dept. of HEW, Human Investment Programs: Delivery of Health Services for the Poor (1967).

[18] See HEW, Hill-Burton Project Register, July 1, 1947–June 30, 1967. HEW Publication No. (HSM) 72–4011, p. 37. Maricopa County has received over $2 million in Hill-Burton (42 U. S. C. § 291 *et seq.*) funds since 1947.

to and settle in that State.[19] Accordingly, the classification created by the residence requirement, "unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro*, 394 U. S., at 634. (Emphasis in original.)

VI

We turn now to the question of whether the State has shown that its durational residence requirement is "legitimately defensible," [20] in that it furthers a compelling state interest.[21] A number of purposes are asserted to be served by the requirement and we must

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[19] Medicaid, the primary federal program for providing medical care to indigents at public expense, does not permit participating States to apply a durational residence requirement as a condition to eligibility, 42 U. S. C. § 1396a (b)(3), and "this conclusion of a coequal branch of Government is not without significance." *Frontiero* v. *Richardson*, 411 U. S. 677, 687–688 (1973). The State of Arizona does not participate in the Medicaid program.

[20] Cf. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1223–1224 (1970); Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1076–1077 (1969).

[21] The Arizona Supreme Court observed that because this case involves a governmental benefit akin to welfare, the "reasonable basis" test of *Dandridge* v. *Williams*, 397 U. S. 471 (1970), should apply. In upholding a state regulation placing an absolute limit on the amount of welfare assistance to be paid a dependent family regardless of size or actual need, the Court in *Dandridge* found it "enough that the State's action be rationally based and free from invidious discrimination." *Id.*, at 487. The Court later distinguished *Dandridge* in *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971), where MR. JUSTICE BLACKMUN, writing for the Court, observed that "[a]ppellants' attempted reliance on *Dandridge* . . . is also misplaced, since the classification involved in that case [did not impinge] upon a fundamental constitutional right . . . ." Strict scrutiny is required here because the challenged classification impinges on the right of interstate travel. Compare *Dandridge, supra*, at 484 n. 16, with *Shapiro* v. *Thompson, supra*.

determine whether these satisfy the appellees' heavy burden of justification, and insure that the State, in pursuing its asserted objectives, has chosen means that do not unnecessarily burden constitutionally protected interests. *NAACP* v. *Button*, 371 U. S. 415, 438 (1963).

A

The Arizona Supreme Court observed:

> "Absent a residence requirement, any indigent sick person . . . could seek admission to [Maricopa County's] hospital, the facilities being the newest and most modern in the state, and the resultant volume would cause long waiting periods or severe hardship on [the] county if it tried to tax its property owners to support [these] indigent sick . . . ." 108 Ariz. 373, 376, 498 P. 2d 461, 464.

The County thus attempts to sustain the requirement as a necessary means to insure the fiscal integrity of its free medical care program by discouraging an influx of indigents, particularly those entering the County for the sole purpose of obtaining the benefits of its hospital facilities.

First, a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens, *Shapiro, supra*, at 633, so appellees must do more than show that denying free medical care to new residents saves money. The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State. See *Rivera* v. *Dunn*, 329 F. Supp. 554 (Conn. 1971), aff'd, 404 U. S. 1054 (1972).

Second, to the extent the purpose of the requirement is to inhibit the immigration of indigents gen-

erally, that goal is constitutionally impermissible.[22] And, to the extent the purpose is to deter only those indigents who take up residence in the County solely to utilize its new and modern public medical facilities, the requirement at issue is clearly overinclusive. The challenged durational residence requirement treats every indigent, in his first year of residence, as if he came to the jurisdiction solely to obtain free medical care. Such a classification is no more defensible than the waiting period in *Shapiro, supra,* of which the Court said:

> "[T]he class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits." 394 U. S., at 631.

Moreover, "a State may no more try to fence out those indigents who seek [better public medical facilities] than it may try to fence out indigents generally." *Ibid.* An indigent who considers the quality of public hospital facilities in entering the State is no less deserving than one who moves into the State in order to take advantage of its better educational facilities. *Id.,* at 631–632.

It is also useful to look at the other side of the coin—at who will bear the cost of indigents' illnesses if the County does not provide needed treatment. For those newly arrived residents who do receive at least hospital care, the cost is often borne by private nonprofit hospitals, like appellant Memorial—many of which are already in precarious financial straits.[23] When absorbed

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[22] *Shapiro* v. *Thompson,* 394 U. S., at 629.

[23] See Cantor, The Law and Poor People's Access to Health Care, 35 Law & Contemp. Prob. 901, 909–914 (1970); cf. *Catholic Medical Center* v. *Rockefeller,* 305 F. Supp. 1256 and 1268 (EDNY 1969), vacated and remanded, 397 U. S. 820, aff'd on remand, 430 F. 2d 1297, appeal dismissed, 400 U. S. 931 (1970).

by private hospitals, the costs of caring for indigents must be passed on to paying patients and "at a rather inconvenient time"—adding to the already astronomical costs of hospitalization which bear so heavily on the resources of most Americans.[24] The financial pressures under which private nonprofit hospitals operate have already led many of them to turn away patients who cannot pay or to severely limit the number of indigents they will admit.[25] And, for those indigents who receive no care, the cost is, of course, measured by their own suffering.

In addition, the County's claimed fiscal savings may well be illusory. The lack of timely medical care could cause a patient's condition to deteriorate to a point where more expensive emergency hospitalization (for which no durational residence requirement applies) is needed. And, the disability that may result from letting an untreated condition deteriorate may well result in the patient and his family becoming a burden on the State's welfare rolls for the duration of his emergency care, or permanently, if his capacity to work is impaired.[26]

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[24] HEW Report on Medical Resources, *supra,* n. 14, at 74. See generally Health, Message from the President, *supra,* n. 14; E. Kennedy, In Critical Condition: The Crises in America's Health Care (1973); Hearings on The Health Care Crisis in America before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (1971).

[25] Cantor, *supra,* n. 23; See E. Kennedy, *supra,* n. 24, at 78–94; Note, Working Rules for Assuring Nondiscrimination in Hospital Administration, 74 Yale L. J. 151, 156 n. 32 (1964); cf., *e. g., Stanturf* v. *Sipes,* 447 S. W. 2d 558 (Mo. 1969) (hospital refused treatment to frostbite victim who was unable to pay $25 deposit). See generally HEW Report on Medical Resources, *supra,* n. 14, at 74; Hearings on The Health Care Crisis in America, *supra,* n. 24.

[26] "[L]ack of timely hospitalization and medical care for those unable to pay has been considered an economic liability to the patient, the hospital, and to the community in which these citizens

The appellees also argue that eliminating the durational residence requirement would dilute the quality of services provided to longtime residents by fostering an influx of newcomers and thus requiring the County's limited public health resources to serve an expanded pool of recipients. Appellees assert that the County should be able to protect its longtime residents because of their contributions to the community, particularly through the past payment of taxes. We rejected this "contributory" rationale both in *Shapiro* and in *Vlandis* v. *Kline*, 412 U. S. 441, 450 n. 6 (1973), by observing:

> "[Such] reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services." *Shapiro*, 394 U. S., at 632–633 (footnote omitted).

Appellees express a concern that the threat of an influx of indigents would discourage "the development of modern and effective [public medical] facilities." It is suggested that whether or not the durational residence requirement actually deters migration, the voters think that it protects them from low income families' being attracted by the county hospital; hence, the requirement is necessary for public support of that medical facility. A State may not employ an invidious discrimination to sustain the political viability of its programs. As we

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might otherwise be self-supporting . . . ." HEW Report on Medical Resources, *supra*, n. 14, at 73; Comment, Indigents, Hospital Admissions and Equal Protection, 5 U. Mich. J. L. Reform 502, 515–516 (1972); cf. Battistella & Southby, Crisis in American Medicine, The Lancet 581, 582 (Mar. 16, 1968).

observed in *Shapiro, supra,* at 641, "[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools," but that purpose would not sustain such a scheme. See also *Cole* v. *Housing Authority of the City of Newport,* 435 F. 2d 807, 812–813 (CA1 1970).

B

The appellees also argue that the challenged statute serves some administrative objectives. They claim that the one-year waiting period is a convenient rule of thumb to determine bona fide residence. Besides not being factually defensible, this test is certainly overbroad to accomplish its avowed purpose. A mere residence requirement would accomplish the objective of limiting the use of public medical facilities to bona fide residents of the County without sweeping within its prohibitions those bona fide residents who had moved into the State within the qualifying period. Less drastic means, which do not impinge on the right of interstate travel, are available and employed [27] to ascertain an individual's true intentions, without exacting a protracted waiting period which may have dire economic and health consequences for certain citizens. See *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960). The Arizona State welfare agency applies criteria other than the duration of residency to determine whether an applicant is a bona fide resident.[28] The Arizona Medical Assistance to the Aged law provides public medical care for certain senior citizens, conditioned only on residence.[29] Pinal County, Arizona, has operated its public hospital without benefit of the

[27] See *Green* v. *Dept. of Public Welfare of Delaware,* 270 F. Supp. 173, 177–178 (Del. 1967).

[28] Ariz. Rev. Stat. Ann. § 46–292 (1) (Supp. 1973–1974).

[29] § 46–261.02 (3) (Supp. 1973–1974).

durational residence requirement since the application of the challenged statute in that County was enjoined by a federal court in *Valenciano* v. *Bateman*, 323 F. Supp. 600 (Ariz. 1971).[30]

The appellees allege that the waiting period is a useful tool for preventing fraud. Certainly, a State has a valid interest in preventing fraud by any applicant for medical care, whether a newcomer or oldtime resident, *Shapiro*, 394 U. S., at 637, but the challenged provision is ill-suited to that purpose. An indigent applicant, intent on committing fraud, could as easily swear to having been a resident of the county for the preceding year as to being one currently. And, there is no need for the State to rely on the durational requirement as a safeguard against fraud when other mechanisms to serve that purpose are available which would have a less drastic impact on constitutionally protected interests. *NAACP* v. *Button*, 371 U. S., at 438. For example, state law makes it a crime to file an "untrue statement . . . for the purpose of obtaining hospitalization, medical care or outpatient relief" at county expense. Ariz. Rev. Stat. Ann. § 11–297C (Supp. 1973–1974). See *Dunn*, 405 U. S., at 353–354; *U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973).

Finally, appellees assert that the waiting period is necessary for budget predictability, but what was said in *Shapiro* is equally applicable to the case before us:

"The records . . . are utterly devoid of evidence that

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[30] In addition, Pima County, Arizona, did not apply the durational residence requirement between August 1969, when the requirement was found unconstitutional by the Arizona Court of Appeals, *Board of Supervisors, Pima County* v. *Robinson*, 10 Ariz. App. 238, 457 P. 2d 951, and September 1970, when that judgment was vacated as moot by the Arizona Supreme Court, 105 Ariz. 280, 463 P. 2d 536.

> [the County] uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. [The appellees do not take] a census of new residents . . . . Nor are new residents required to give advance notice of their need for . . . assistance. Thus, the . . . authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance." 394 U. S., at 634–635 (footnote omitted).

Whatever the difficulties in projecting how many newcomers to a jurisdiction will require welfare assistance, it could only be an even more difficult and speculative task to estimate how many of those indigent newcomers will require medical care during their first year in the jurisdiction. The irrelevance of the one-year residence requirement to budgetary planning is further underscored by the fact that *emergency* medical care for all newcomers and more complete medical care for the aged are currently being provided at public expense regardless of whether the patient has been a resident of the County for the preceding year. See *Shapiro, supra,* at 635.

VII

The Arizona durational residence requirement for eligibility for nonemergency free medical care creates an "invidious classification" that impinges on the right of interstate travel by denying newcomers "basic necessities of life." Such a classification can only be sustained on a showing of a compelling state interest. Appellees have not met their heavy burden of justification, or demonstrated that the State, in pursuing legitimate objectives, has chosen means which do not unnecessarily impinge on constitutionally protected interests. Accordingly, the judgment of the Supreme Court of Arizona is reversed and

the case remanded for further action not inconsistent with this opinion.

So ordered.

THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN concur in the result.

MR. JUSTICE DOUGLAS.

The legal and economic aspects of medical care [1] are enormous; and I doubt if decisions under the Equal Protection Clause of the Fourteenth Amendment are equal to the task of dealing with these matters. So far as interstate travel *per se* is considered, I share the doubts of my Brother REHNQUIST. The present case, however, turns for me on a different axis. The problem has many aspects. The therapy of Arizona's atmosphere brings many there who suffer from asthma, bronchitis, arthritis, and tuberculosis. Many coming are indigent or become indigent after arrival. Arizona does not deny medical help to "emergency" cases "when immediate hospitalization or medical care is necessary for the preservation of life or limb," Ariz. Rev. Stat. Ann. § 11–297A (Supp. 1973–1974). For others, it requires a 12-month durational residence.

The Act is not aimed at interstate travelers; it applies even to a long-term resident who moves from one county to another. As stated by the Supreme Court of Arizona in the present case: "The requirement applies to all citizens within the state including long term residents of one county who move to another county. Thus, the classification does not single out non-residents nor attempt to penalize interstate travel. The requirement is uniformly applied." 108 Ariz. 373, 375, 498 P. 2d 461, 463.

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[1] See appendix to this opinion, *post*, p. 274.

What Arizona has done, therefore, is to fence the poor out of the metropolitan counties, such as Maricopa County (Phoenix) and Pima County (Tucson) by use of a durational residence requirement. We are told that eight Arizona counties have no county hospitals and that most indigent care in those areas exists only on a contract basis. In *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, we had a case where Texas created a scheme by which school districts with a low property tax base, from which they could raise only meager funds, offered a lower quality of education to their students than the wealthier districts. That system was upheld against the charge that the state system violated the Equal Protection Clause. It was a closely divided Court and I was in dissent. I suppose that if a State can fence in the poor in educational programs, it can do so in medical programs. But to allow Arizona freedom to carry forward its medical program we must go one step beyond the *San Antonio* case. In the latter there was no legal barrier to movement into a better district. Here a one-year barrier to medical care, save for "emergency" care, is erected around the areas that have medical facilities for the poor.

Congress has struggled with the problem. In the Kerr-Mills Act of 1960, 74 Stat. 987, 42 U. S. C. § 302 (b)(2), it added provisions to the Social Security Act requiring the Secretary of Health, Education, and Welfare to disapprove any state plan for medical assistance to the aged (Medicaid) that excludes "any individual who resides in the state," thus eliminating durational residence requirements.

Maricopa County has received over $2 million in federal funds for hospital construction under the Hill-Burton Act, 42 U. S. C. § 291 *et seq.* Section 291c (e) authorizes the issuance of regulations governing the op-

eration of Hill-Burton facilities. The regulations contain conditions that the facility to be constructed or modernized with the funds "will be made available to all persons residing in the territorial area of the applicant" and that the applicant will render "a reasonable volume of services to persons unable to pay therefor." [2] The conditions of free services for indigents, however, may be waived if "not feasible from a financial viewpoint."

Prior to the application the state agency must obtain from the applicant an assurance "that there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor. The requirement of an assurance from an applicant shall be waived if the applicant demonstrates to the satisfaction of the State agency, subject to subsequent approval by the Secretary, that such a requirement is not feasible from a financial viewpoint." 42 CFR § 53.111 (c)(1).[3]

So far as I can ascertain, the durational residence requirement imposed by Maricopa County has not been federally approved as a condition to the receipt of Hill-Burton funds.

Maricopa County does argue that it is not financially feasible to provide free nonemergency medical care to new residents. Even so, the federal regulatory framework does not leave the County uncontrolled in determining which indigents will receive the benefit of the resources which are available. It is clear, for example, that the County could not limit such service to whites out of

[2] Title 42 CFR § 53.111 (b)(8) defines that term to mean "a level of uncompensated services which meets a need for such services in the area served by an applicant and which is within the financial ability of such applicant to provide."

[3] The waiver of such a requirement requires notice and opportunity for public hearing. 42 CFR § 53.111 (c)(2).

a professed inability to service indigents of all races because 42 CFR § 53.112 (c) prohibits such discrimination in the operation of Hill-Burton facilities. It does not allow racial discrimination even against transients.

Moreover, Hill-Burton Act donees are guided by 42 CFR § 53.111 (g), which sets out in some detail the criteria which must be used in identifying persons unable to pay for such services. The criteria include the patient's health and medical insurance coverage, personal and family income, financial obligations and resources, and "similar factors." Maricopa County, pursuant to the state law here challenged, employs length of county residence as an additional criterion in identifying indigent recipients of uncompensated nonemergency medical care. The federal regulations, however, do not seem to recognize that as an acceptable criterion.

And, as we held in *Thorpe* v. *Housing Authority,* 393 U. S. 268; *Mourning* v. *Family Publications Service,* 411 U. S. 356, these federal conditions attached to federal grants are valid when "reasonably related to the purposes of the enabling legislation." 393 U. S., at 280–281.

It is difficult to impute to Congress approval of the durational residence requirement, for the implications of such a decision would involve weighty equal protection considerations by which the Federal Government, *Bolling* v. *Sharpe,* 347 U. S. 497, as well as the States, are bound.

The political processes[4] rather than equal protection litigation are the ultimate solution of the present problem. But in the setting of this case the invidious discrimination against the poor, *Harper* v. *Virginia Board*

[4] For the impact of "free" indigent care on private hospitals and their paying patients see Dept. of Health, Education, and Welfare (HEW) Report on Medical Resources Available to Meet the Needs of Public Assistance Recipients, House Committee on Ways and Means, 86th Cong., 2d Sess. (Comm. Print 1961).

of Elections, 383 U. S. 663, not the right to travel interstate, is in my view the critical issue.

APPENDIX TO OPINION OF DOUGLAS, J.

GOURMAND AND FOOD—A FABLE [5]

The people of Gourmand loved good food. They ate in good restaurants, donated money for cooking research, and instructed their government to safeguard all matters having to do with food. Long ago, the food industry had been in total chaos. There were many restaurants, some very small. Anyone could call himself a chef or open a restaurant. In choosing a restaurant, one could never be sure that the meal would be good. A commission of distinguished chefs studied the situation and recommended that no one be allowed to touch food except for qualified chefs. "Food is too important to be left to amateurs," they said. Qualified chefs were licensed by the state with severe penalties for anyone else who engaged in cooking. Certain exceptions were made for food preparation in the home, but a person could serve only his own family. Furthermore, to become a qualified chef, a man had to complete at least twenty-one years of training (including four years of college, four years of cooking school, and one year of apprenticeship). All cooking schools had to be first class.

These reforms did succeed in raising the quality of cooking. But a restaurant meal became substantially more expensive. A second commission observed that not everyone could afford to eat out. "No one," they said, "should be denied a good meal because of his

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[5] Foreword to an article on Medical Care and its Delivery: An Economic Appraisal by Judith R. Lave and Lester B. Lave in 35 Law & Contemp. Prob. 252 (1970).

income." Furthermore, they argued that chefs should work toward the goal of giving everyone "complete physical and psychological satisfaction." For those people who could not afford to eat out, the government declared that they should be allowed to do so as often as they liked and the government would pay. For others, it was recommended that they organize themselves in groups and pay part of their income into a pool that would undertake to pay the costs incurred by members in dining out. To insure the greatest satisfaction, the groups were set up so that a member could eat out anywhere and as often as he liked, could have as elaborate a meal as he desired, and would have to pay nothing or only a small percentage of the cost. The cost of joining such prepaid dining clubs rose sharply.

Long ago, most restaurants would have one chef to prepare the food. A few restaurants were more elaborate, with chefs specializing in roasting, fish, salads, sauces, and many other things. People rarely went to these elaborate restaurants since they were so expensive. With the establishment of prepaid dining clubs, everyone wanted to eat at these fancy restaurants. At the same time, young chefs in school disdained going to cook in a small restaurant where they would have to cook everything. The pay was higher and it was much more prestigious to specialize and cook at a really fancy restaurant. Soon there were not enough chefs to keep the small restaurants open.

With prepaid clubs and free meals for the poor, many people started eating their three-course meals at the elaborate restaurants. Then they began to increase the number of courses, directing the chef to "serve the best with no thought for the bill." (Recently a 317-course meal was served.)

The costs of eating out rose faster and faster. A new

government commission reported as follows: (1) Noting that licensed chefs were being used to peel potatoes and wash lettuce, the commission recommended that these tasks be handed over to licensed dishwashers (whose three years of dishwashing training included cooking courses) or to some new category of personnel. (2) Concluding that many licensed chefs were overworked, the commission recommended that cooking schools be expanded, that the length of training be shortened, and that applicants with lesser qualifications be admitted. (3) The commission also observed that chefs were unhappy because people seemed to be more concerned about the decor and service than about the food. (In a recent taste test, not only could one patron not tell the difference between a 1930 and a 1970 vintage but he also could not distinguish between white and red wines. He explained that he always ordered the 1930 vintage because he knew that only a really good restaurant would stock such an expensive wine.)

The commission agreed that weighty problems faced the nation. They recommended that a national prepayment group be established which everyone must join. They recommended that chefs continue to be paid on the basis of the number of dishes they prepared. They recommended that every Gourmandese be given the right to eat anywhere he chose and as elaborately as he chose and pay nothing.

These recommendations were adopted. Large numbers of people spent all of their time ordering incredibly elaborate meals. Kitchens became marvels of new, expensive equipment. All those who were not consuming restaurant food were in the kitchen preparing it. Since no one in Gourmand did anything except prepare or eat meals, the country collapsed.

MR. JUSTICE REHNQUIST, dissenting.

I

The State of Arizona provides free medical care for indigents. Confronted, in common with its 49 sister States, with the assault of spiraling health and welfare costs upon limited state resources, it has felt bound to require that recipients meet three standards of eligibility.[1] First, they must be indigent, unemployable, or unable to provide their own care. Second, they must be residents of the county in which they seek aid. Third, they must have maintained their residence for a period of one year. These standards, however, apply only to persons seeking nonemergency aid. An exception is specifically provided for "emergency cases when immediate hospitalization or medical care is necessary for the preservation of life or limb . . . ."

Appellant Evaro moved from New Mexico to Arizona in June 1971, suffering from a "chronic asthmatic and bronchial illness." In July 1971 he experienced a respiratory attack, and obtained treatment at the facilities of appellant Memorial Hospital, a privately operated

[1] Ariz. Rev. Stat. Ann. § 11–297A (Supp. 1973–1974) reads as follows:

"Except in emergency cases when immediate hospitalization or medical care is necessary for the preservation of life or limb no person shall be provided hospitalization, medical care or outpatient relief under the provisions of this article without first filing with a member of the board of supervisors of the county in which he resides a statement in writing, subscribed and sworn to under oath, that he is an indigent as shall be defined by rules and regulations of the state department of economic security, an unemployable totally dependent upon the state or county government for financial support, or an employable of sworn low income without sufficient funds to provide himself necessary hospitalization and medical care, and that he has been a resident of the county for the preceding twelve months."

institution. The hospital sought to recover its expenses from appellee Maricopa County under the provisions of Ariz. Rev. Stat. Ann. § 11–297A (Supp. 1973–1974), asserting that Evaro was entitled to receive county care. Since he did not satisfy the eligibility requirements discussed above,[2] appellee declined to assume responsibility for his care, and this suit was then instituted in the State Superior Court.

Appellants did not, and could not, claim that there is a constitutional right to nonemergency medical care at state or county expense or a constitutional right to reimbursement for care extended by a private hospital.[3] They asserted, however, that the state legislature, having decided to give free care to certain classes of persons, must give that care to Evaro as well. The Court upholds that claim, holding that the Arizona eligibility requirements burdened Evaro's "right to travel."

Unlike many traditional government services, such as police or fire protection, the provision of health care has commonly been undertaken by private facilities and personnel. But as strains on private services become greater, and the costs of obtaining care increase, federal, state, and local governments have been pressed to assume a larger role. Reasonably enough, it seems to me, those governments which now find themselves in the hospital business seek to operate that business primarily for those

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[2] The parties stipulated that Mr. Evaro was "an indigent who recently changed his residence from New Mexico to Arizona and who has resided in the state of Arizona for less than twelve months." App. 10. Therefore Mr. Evaro failed to meet only the third requirement discussed in the text.

[3] This Court has noted that citizens have no constitutional right to welfare benefits. See, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 33 (1973).

persons dependent on the financing locality both by association and by need.

Appellants in this case nevertheless argue that the State's efforts, admirable though they may be, are simply not impressive enough. But others excluded by eligibility requirements certainly could make similar protests. Maricopa County residents of many years, paying taxes to both construct and support public hospital facilities, may be ineligible for care because their incomes are slightly above the marginal level for inclusion. These people have been excluded by the State, not because their claim on limited public resources is without merit, but because it has been deemed less meritorious than the claims of those in even greater need. Given a finite amount of resources, Arizona after today's decision may well conclude that its indigency threshold should be elevated since its counties must provide for out-of-state migrants as well as for residents of longer standing. These more stringent need requirements would then deny care to additional persons who until now would have qualified for aid.

Those presently excluded because marginally above the State's indigency standards, those who may be excluded in the future because of more stringent indigency requirements necessitated by today's decision, and appellant Evaro, all have a plausible claim to government-supported medical care. The choice between them necessitated by a finite amount of resources is a classic example of the determination of priorities to be accorded conflicting claims, and would in the recent past have been thought to be a matter particularly within the competence of the state legislature to decide. As this Court stated in *Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970), "the Constitution does not empower this Court to second-guess state officials charged with the difficult

responsibility of allocating limited public welfare funds among the myriad of potential recipients."

The Court holds, however, that the State was barred from making the choice it made because of the burden its choice placed upon Evaro's "right to travel." Although the Court's definition of this "right" is hardly precise, the Court does state: "[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." This rationale merits further attention.

II

The right to travel throughout the Nation has been recognized for over a century in the decisions of this Court.[4] See *Crandall* v. *Nevada*, 6 Wall. 35 (1868). But the concept of that right has not been static. To see how distant a cousin the right to travel enunciated in this case is to the right declared by the Court in *Crandall*, reference need only be made to the language of Mr. Justice Miller, speaking for the Court:

> "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are

[4] Although the right to travel has been recognized by this Court for over a century, the origin of the right still remains somewhat obscure. The majority opinion in this case makes no effort to identify the source, simply relying on recent cases which state such a right exists.

> conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." *Id.*, at 44.

The Court in *Crandall* established no right to free benefits from every State through which the traveler might pass, but more modestly held that the State could not use its taxing power to impede travel across its borders.[5]

Later cases also defined this right to travel quite conservatively. For example, in *Williams* v. *Fears*, 179 U. S. 270 (1900), the Court upheld a Georgia statute taxing "emigrant agents"—persons hiring labor for work *outside* the State—although agents hiring for local work went untaxed. The Court recognized that a right to travel existed, stating:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution." *Id.*, at 274.

The Court went on, however, to decide that the statute, despite the added cost it assessed against exported labor, affected freedom of egress "only incidentally and remotely." *Ibid.*[6]

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[5] The tax levied by the State of Nevada was upon every person leaving the State. As this Court has since noted, the tax was a direct tax on travel and was not intended to be a charge for the use of state facilities. See *Evansville Airport* v. *Delta Airlines*, 405 U. S. 707 (1972).

[6] The Court also rejected an equal protection argument, concluding: "We are unable to say that such a discrimination, if it existed,

The leading earlier case, *Edwards* v. *California*, 314 U. S. 160 (1941), provides equally little support for the Court's expansive holding here. In *Edwards* the Court invalidated a California statute which subjected to criminal penalties any person "that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person." *Id.*, at 171. Five members of the Court found the statute unconstitutional under the Commerce Clause, finding in the Clause a "prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Id.*, at 173. Four concurring Justices found a better justification for the result in the Fourteenth Amendment's protection of the "privileges of national citizenship." [7]

Regardless of the right's precise source and definition, it is clear that the statute invalidated in *Edwards* was specifically designed to, and would, deter indigent persons from entering the State of California. The imposition of criminal penalties on all persons assisting the entry of an indigent served to block ingress as surely as if the State had posted guards at the border to turn indigents away. It made no difference to the operation of the statute that the indigent, once inside the State, would be supported by federal payments.[8] Furthermore,

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did not rest on reasonable grounds, and was not within the discretion of the state legislature." 179 U. S., at 276.

[7] See the concurring opinions of MR. JUSTICE DOUGLAS (with whom Mr. Justice Black and Mr. Justice Murphy joined), 314 U. S., at 177, and Mr. Justice Jackson, *id.*, at 181.

[8] The Court in *Edwards* observed: "After arriving in California [the indigent] was aided by the Farm Security Administration, which . . . is wholly financed by the Federal government." 314 U. S., at 175. The Court did not express a view at that time as to whether a different result would have been reached if the State bore the financial burden. But cf. *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

the statute did not require that the indigent intend to take up continuous residence within the State. The statute was not therefore an incidental or remote barrier to migration, but was in fact an effective and purposeful attempt to insulate the State from indigents.

The statute in the present case raises no comparable barrier. Admittedly, some indigent persons desiring to reside in Arizona may choose to weigh the possible detriment of providing their own nonemergency health care during the first year of their residence against the total benefits to be gained from continuing location within the State, but their mere entry into the State does not invoke criminal penalties. To the contrary, indigents are free to live within the State, to receive welfare benefits necessary for food and shelter,[9] and to receive free emergency medical care if needed. Furthermore, once the indigent has settled within a county for a year, he becomes eligible for full medical care at county expense. To say, therefore, that Arizona's treatment of indigents compares with California's treatment during the 1930's would border on the frivolous.

Since those older cases discussing the right to travel are unhelpful to Evaro's cause here, reliance must be placed elsewhere. A careful reading of the Court's opinion discloses that the decision rests almost entirely on two cases of recent vintage: *Shapiro* v. *Thompson,* 394 U. S. 618 (1969), and *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). In *Shapiro* the Court struck down statutes requiring one year's residence prior to receiving welfare benefits. In *Dunn* the Court struck down a statute requiring a year's residence before receiving the right to vote. In placing reliance on these two cases, the Court

[9] See Ariz. Rev. Stat. Ann. § 46–233 (Supp. 1973–1974), which provides that an eligible recipient of general assistance must have "established residence at the time of application."

must necessarily distinguish or discredit recent cases of this Court upholding statutes requiring a year's residence for lower in-state tuition.[10] The important question for this purpose, according to the Court's analysis, is whether a classification " 'operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration.' " (Emphasis in Court's opinion.)

Since the Court concedes that "some 'waiting-period[s] . . . may not be penalties,' " *ante*, at 258–259, one would expect to learn from the opinion how to distinguish a waiting period which is a penalty from one which is not. Any expense imposed on citizens crossing state lines but not imposed on those staying put could theoretically be deemed a penalty on travel; the toll exacted from persons crossing from Delaware to New Jersey by the Delaware Memorial Bridge is a "penalty" on interstate travel in the most literal sense of all. But such charges,[11] as well as other fees for use of transportation facilities such as taxes on airport users,[12] have been upheld by this Court against attacks based upon the right to travel. It seems to me that the line to be derived from our prior cases is that some financial impositions on interstate travelers have such indirect or inconsequential impact on travel that they simply do not constitute the type of direct purposeful barriers struck down in *Edwards* and *Shapiro*. Where the impact is that remote, a State can reasonably require that the citizen bear some proportion of the State's cost in its facilities. I would think that this standard is not only supported by this Court's decisions, but would be

[10] See *Starns* v. *Malkerson*, 326 F. Supp. 234 (Minn. 1970), aff'd, 401 U. S. 985 (1971); *Vlandis* v. *Kline*, 412 U. S. 441 (1973).

[11] See, *e. g.*, *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245 (1928); *Hendrick* v. *Maryland*, 235 U. S. 610 (1915).

[12] See *Evansville Airport* v. *Delta Airlines*, 405 U. S. 707 (1972).

eminently sensible and workable. But the Court not only rejects this approach, it leaves us entirely without guidance as to the proper standard to be applied.

The Court instead resorts to *ipse dixit*, declaring rather than demonstrating that the right to nonemergency medical care is within the class of rights protected by *Shapiro* and *Dunn:*

> "Whatever the ultimate parameters of the *Shapiro* penalty analysis, *it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance.* And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. See, *e. g., Shapiro, supra; Goldberg* v. *Kelly,* 397 U. S. 254, 264 (1970); *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 340–342 (1969)." *Ante,* at 259. (Emphasis added; footnotes omitted.)

However clear this conclusion may be to the majority, it is certainly not clear to me. The solicitude which the Court has shown in cases involving the right to vote,[13] and the virtual denial of entry inherent in denial of welfare benefits—"the very means by which to live," *Goldberg* v. *Kelly,* 397 U. S. 254, 264 (1970)—ought not be so casually extended to the alleged deprivation here. Rather, the Court should examine, as it has done in the past, whether the challenged requirement erects a real and purposeful barrier to movement, or the threat of such a barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote. As the above discussion has shown, the barrier here is hardly

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[13] See, *e. g., Evans* v. *Cornman,* 398 U. S. 419 (1970); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969).

a counterpart to the barriers condemned in earlier cases. That being so, the Court should observe its traditional respect for the State's allocation of its limited financial resources rather than unjustifiably imposing its own preferences.

III

The Court, in its examination of the proffered state interests, categorically rejects the contention that those who have resided in the county for a fixed period of time may have a greater stake in community facilities than the newly arrived. But this rejection is accomplished more by fiat than by reason. One of the principal factual distinctions between *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), aff'd, 401 U. S. 985 (1971), and *Vlandis* v. *Kline,* 412 U. S. 441 (1973), both of which upheld durational residence requirements for in-state university tuition,[14] and *Shapiro,* which struck them down for welfare recipients, is the nature of the aid which the State or county provides. Welfare benefits, whether in cash or in kind, are commonly funded from current tax revenues, which may well be supported by the very newest arrival as well as by the longtime resident. But universities and hospitals, although demanding operating support from current revenues, require extensive capital facilities which cannot possibly be funded out of current tax revenues. Thus, entirely apart from the majority's conception of whether nonemergency health care is more or less important than continued education,

[14] In *Vlandis,* while striking down a Connecticut statute that in effect prevented a new state resident from obtaining lower tuition rates for the full period of enrollment, we stated that the decision should not "be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status." 412 U. S., at 452. *Starns* was cited as support for this position.

the interest of longer established residents in capital facilities and their greater financial contribution to the construction of such facilities seems indisputable.[15]

Other interests advanced by the State to support its statutory eligibility criteria are also rejected virtually out of hand by the Court. The protection of the county economies is dismissed with the statement that "[t]he conservation of the taxpayers' purse is simply not a sufficient state interest . . . ." [16] The Court points out that the cost of care, if not borne by the Government, may be borne by private hospitals such as appellant Memorial Hospital. While this observation is doubtless true in large part, and is bound to present a problem to any private hospital, it does not seem to me that it thus becomes a constitutional determinant. The Court also observes that the State may in fact *save* money by providing nonemergency medical care rather than waiting for deterioration of an illness. However valuable a qualified cost analysis might be to legislators drafting eligibility requirements, and however little this speculation may bear on Evaro's condition (which the record does not indicate to have been a deteriorating illness), this sort of judgment has traditionally been confided to legislatures, rather than to courts charged with determining constitutional questions.

The Court likewise rejects all arguments based on

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[15] This distinction may be particularly important in a State such as Arizona where the Constitution provides for limitations on state and county debt. See Ariz. Const., Art. 9, § 5 (State); Art. 9, § 8 (County). See generally Comment, Dulling the Edge of Husbandry: The Special Fund Doctrine in Arizona, 1971 L. & Soc. O. (Ariz. St. L. J.) 555.

[16] The appellees in this case filed an affidavit indicating that acceptance of appellants' position would impose an added burden on property taxpayers in Maricopa County of over $2.5 million in the first year alone. App. 12–17.

administrative objectives. Refusing to accept the assertion that a one-year waiting period is a "convenient rule of thumb to determine bona fide residence," the majority simply suggests its own alternatives. Similar analysis is applied in rejecting the appellees' argument based on the potential for fraud. The Court's declaration that an indigent applicant "intent on committing fraud, could as easily swear to having been a resident of the county for the preceding year as to being one currently" ignores the obvious fact that fabricating presence in the State for a year is surely more difficult than fabricating only a present intention to remain.

The legal question in this case is simply whether the State of Arizona has acted arbitrarily in determining that access to local hospital facilities for nonemergency medical care should be denied to persons until they have established residence for one year. The impediment which this quite rational determination has placed on appellant Evaro's "right to travel" is so remote as to be negligible: so far as the record indicates Evaro moved from New Mexico to Arizona three years ago and has remained ever since. The eligibility requirement has not the slightest resemblance to the actual barriers to the right of free ingress and egress protected by the Constitution, and struck down in cases such as *Crandall* and *Edwards*. And, unlike *Shapiro*, it does not involve an urgent need for the necessities of life or a benefit funded from current revenues to which the claimant may well have contributed. It is a substantial broadening of, and departure from, all of these holdings, all the more remarkable for the lack of explanation which accompanies the result. Since I can subscribe neither to the method nor the result, I dissent.

MISSISSIPPI *v.* ARKANSAS

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT

No. 48, Orig. Argued December 5, 1973—Decided February 26, 1974

In this boundary dispute between Arkansas and Mississippi over an area known as Luna Bar in the abandoned bed of the Mississippi River between the upstream and downstream ends of Tarpley Cut-off, where Arkansas' Chicot County and Mississippi's Washington County adjoin, the report of the Special Master is adopted, in which he found that Luna Bar was formed by accretion resulting from the gradual westward movement of the Mississippi River, and is therefore part of the State of Mississippi, and not by avulsive process as claimed by Arkansas. Pp. 291–294.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 294.

Mitchell E. Ward argued the cause for plaintiff. With him on the brief were *Albioun F. Summer*, Attorney General of Mississippi, and *Martin R. McLendon*, Assistant Attorney General.

William H. Drew argued the cause for defendant. With him on the brief was *Jim Guy Tucker*, Attorney General of Arkansas.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Mississippi, prompted by the pendency of private title litigation in the Arkansas courts,[1] instituted this origi-

[1] See *Arkansas Land & Cattle Co.* v. *Anderson-Tully Co.*, 248 Ark. 495, 452 S. W. 2d 632 (1970), a 4–3 decision of the Supreme Court of Arkansas.

nal action against Arkansas in November 1970. The bill of complaint, which accompanied the motion for leave to file, prayed that the boundary line between the two States, in the old bed of the Mississippi River from the upstream end to the downstream end of Tarpley Cut-off, that is, the Spanish Moss Bend-Luna Bar-Carter Point area where Arkansas' Chicot County and Mississippi's Washington County adjoin, be fixed and determined.

The river was originally established as the boundary between the States by their respective Acts of Admission. Mississippi's Act, 3 Stat. 348 (1817), described the line as "up" the river.[2] Arkansas' Act, 5 Stat. 50 (1836), described the line as "up the middle of the main channel of the said river." See, also, Arkansas' Constitution, Art. 1 (1874). Over 50 years ago the question whether there was any difference in the meaning of these two descriptions was resolved and the boundary was determined to be "the middle of the main navigable channel, and not along the line equidistant between the banks." *Arkansas* v. *Mississippi*, 250 U. S. 39, 43 (1919). That decision was in conformity with the rule of the thalweg enunciated in *Iowa* v. *Illinois*, 147 U. S. 1, 7–8, 13 (1893), and followed, in the absence of special circumstances, in many subsequent cases. See, for example, *Minnesota* v. *Wisconsin*, 252 U. S. 273, 281–282 (1920); *New Jersey* v. *Delaware*, 291 U. S. 361, 379–380 (1934); *Arkansas* v. *Tennessee*, 310 U. S. 563, 571 (1940).

Arkansas responded to Mississippi's motion and moved that leave to file be denied and that the complaint be dismissed. The motion for leave to file, however, was granted. 400 U. S. 1019 (1971). Thereafter, the Hon-

[2] Mississippi's Constitution of 1890, Art. 2, however, reads, "up the middle of the Mississippi river, or thread of the stream."

orable Clifford O'Sullivan was appointed Special Master. 402 U. S. 926 (1971). The Master's report eventually issued and was ordered filed. 411 U. S. 913 (1973).[3] Arkansas' exceptions to the report and Mississippi's response to those exceptions were forthcoming in due course and the case has been argued to this Court.

Prior to 1935 Spanish Moss Bend was on the thalweg, or primary channel, of the Mississippi River. It has not been the thalweg, however, since the Tarpley Cut-off was established about five miles to the east in 1935 by the United States Army Corps of Engineers. The present controversy focuses on what is known as Luna Bar on the eastern bank of the old river at Spanish Moss Bend. The issue simply is whether Luna Bar came into being by gradual migration of the river westward, or, instead, by some avulsive process, also to the westward. Depending on the resolution of this factual issue, legal consequences ensue in line with established principles conceded by the two States to be the law relating to riparian accretion and avulsion. *Nebraska* v. *Iowa,* 143 U. S. 359 (1892); *Missouri* v. *Nebraska,* 196 U. S. 23 (1904); *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313, 325–327 (1973). These principles need no reiteration here. It suffices to say that if Luna Bar was formed by accretion, this litigation is to be resolved in favor of Mississippi, and, contrarily, if Luna Bar resulted from an avulsion, the suit is to be resolved in favor of Arkansas.

Upon our independent review of the record, we find ourselves in complete agreement and accord with the findings of fact made by the Special Master.[4] Report

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[3] Other orders are reported at 402 U. S. 939 (1971) and at 403 U. S. 951 (1971).

[4] Although the precedent is not binding in this original action between the two States, it is not without interest to note that in

34. We therefore affirm those findings, overrule Arkansas' exceptions to the Master's report, confirm that report, and in general accept the Master's recommendations for a decree.

We deem it unnecessary to outline at length the evidence adduced, or to reproduce here the detailed analysis of that evidence made by the Special Master. We note only that the dissent would regard the case as close because of three factors: (1) certain testimony as to ancient trees on Luna Bar indicated by the presence of three stumps that could not have lived and died there in the last 100 years, (2) some testimony as to soil on the bar "not compatible with the soil that would result from accretion," *post*, at 298, and (3) the bar's "hard core . . . elevation," *post*, at 299–300, that coincides with the elevation "on the adjacent Arkansas bank." These factors, in our view, would be pertinent except that they reflect only the approach and testimony of Arkansas' witnesses and overlook pertinent and persuasive testimony to the opposite effect from expert witnesses for Mississippi. The latter are the witnesses that the Special Master credited, as do we, in the evaluation of the conflicting testimony.

Arkansas conceded that Mississippi made out a prima facie case of accretion. Tr. of Oral Arg. 19. In addition, the Master was impressed with the total absence of

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private litigation Luna Bar has been determined to be in Mississippi. *Anderson-Tully Co.* v. *Walls*, 266 F. Supp. 804 (ND Miss. 1967). Another private suit involving the issue is the one mentioned above as pending in the Arkansas state courts. *Arkansas Land & Cattle Co.* v. *Anderson-Tully Co.*, *supra*. Further proceedings in that litigation were stayed on February 16, 1971, by the Chancery Court of Chicot County, Arkansas, until final judgment in the present action. Special counsel for the respective States here were counsel for the private parties in the cited federal and state court cases.

any known historical reference to an avulsion in this area that changed the course of the river by the necessary half mile. And the dissent acknowledges, *post*, at 295, as to how "Mississippi made its case," and concedes that the testimony "gives force to the argument that accretion formed Luna Bar," that there was testimony that in the Mississippi River "avulsion would shorten the course of the river, while here the course was lengthened," and that Mississippi's experts knew of no instance "where avulsion had worked the way Arkansas claims."

So far as the ancient tree stumps are concerned, Mississippi presented evidence from forestry experts that the forest on Luna Bar was one predominantly of pioneer species with the expected small accompanying, scattered areas of secondary and climax trees, and with no tree more than 37 years old. This is consistent with the first appearance of growth upon Luna Bar depicted in early Mississippi River Commission charts showing the bar to be barren and without vegetation. Report 10. Mississippi's position as to the three particular stumps was that they had been washed in by floodwaters in preceding years; that one had moss on its roots, a condition incompatible with growth in place; and that, at the point where another allegedly was found in 1972, the elevation of the bar was at least 10 feet above what it had been 90 years earlier. Thus the stump necessarily should have been deep in the undersoil of the bar and not on its surface at the time of its removal. Report 11.

The soil composition is purely a matter of conflicting testimony and we are persuaded by Mississippi's evidence. Deep borings, of course, would be below the riverbed, and would be expected to be consistent throughout the area on both sides of the river. And, as noted above, charts of 1882 and 1894, admitted into

evidence, show Luna Bar as a dry sandbar with no vegetation.

The claim of similar elevations, too, encounters strong and convincing opposing authority. Dr. Charles R. Kolb, a highly qualified expert for Mississippi, testified that his study disclosed that the Arkansas bank, from the first comparative recordings until fairly recent times, was about 12 feet higher than Luna Bar. Report 15, 19. R. 354–357. And there is an absence of levee formations on Luna Bar, as contrasted with the presence of pre-1860 levees on the Arkansas bank.

We agree with the Special Master's evaluation of the evidence and conclude, as he did, that Arkansas did not sustain its burden of rebutting Mississippi's conceded prima facie case, a burden the Arkansas court has described as "considerable." *Pannell* v. *Earls*, 252 Ark. 385, 388, 483 S. W. 2d 440, 442 (1972).

Upon our own consideration and our independent review of the entire record, of the report filed by the Special Master, of the exceptions filed thereto, and of the argument thereon, a decree is accordingly entered.

It is so ordered.

[For decree adopted and entered by the Court, see *post*, p. 302.]

MR. JUSTICE DOUGLAS, dissenting.

Luna Bar is today an island in the Mississippi River. Arkansas on the west claims it is hers because the river as a result of an avulsion moved west. Mississippi claims it is hers because Luna Bar was created as a result of slow gradual accretion. The Special Master found for Mississippi and the case is here on exceptions to his Report.

No one has a historical recorded account of what happened. Mississippi made its case by use of experts who testified as to how the Mississippi River usually performs. They testified that the river at low water washes the concave side of a turn (this being the side that marks Luna Bar) but that during high water it scours the convex side (that being Arkansas). That testimony gives force to the argument that accretion formed Luna Bar, washing heavily Arkansas land to form the island. Favoring Mississippi was other testimony that at least in the Mississippi River avulsion would shorten the course of the river, while here the course was lengthened. Never did the experts know of an instance where avulsion had worked the way Arkansas claims.

Opposed to these highly qualified experts were lay witnesses who knew Luna Bar. They had located great trees that once grew there, the age of the trees going back before 1800. Luna Bar therefore was not recently created nor was it created within the last 100 years. It had been there a long, long time. Moreover, the soil matched Arkansas' soil and the height of the land on Luna Bar was comparable to Arkansas' elevation. The Arkansas case was further bolstered by the theory that in the 1870's the avulsive action took place when the river returned to its old channel.

The Special Master stated in his report:

> "I am aware that as Special Master it is not my function to render a decision. My duty is to make a report containing such review of the evidence as I consider justifies my findings of fact. I do not consider that to make the findings I do, it is necessary to totally destroy the validity of Arkansas' contentions. The burden of persuasion was upon Arkansas. Initially Arkansas conceded that Missis-

sippi had met its initial burden, aided as it was by the presumption that the change in the thalweg of the river was the product of accretion. The quite special character of the reasoning of Arkansas' witnesses leaves me unpersuaded that it has met its burden of proof. I make clear also that I would come to this conclusion even if the burden of proof was not on Arkansas, but was on plaintiff Mississippi." Report of Special Master 33.

The case is close and if we were governed by the rule governing district court findings when an appeal is taken I would agree that the Special Master's findings are not "clearly erroneous." Heretofore the Court has not considered itself limited in its review of its Masters by the "clearly erroneous" test.[1] We said in *United*

[1] Fed. Rule Civ. Proc. 52 (a) provides that findings of fact made by district courts "shall not be set aside unless clearly erroneous." It also provides that "[t]he findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Rule 53 (e)(2) provides that "[i]n an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." But those Rules are applicable only to "the procedure in the United States district courts in all suits of a civil nature." Rule 1.

But we have never formulated such a rule when it comes to our review of reports submitted by Special Masters whom we have named in cases under our original jurisdiction. It seems inappropriate that we adopt such a rule in view of the delicacy and gravity of many of the issues in these contests between two sovereign States or between the United States and one or more of the States. The ultimate decision on the facts should rest with us, the sole tribunal to which the resolution of the issues in this type of case has been entrusted by Art. III.

In *Georgia* v. *Brailsford*, 3 Dall. 1, the Court in a case under the head of its original jurisdiction impaneled a jury. And that procedure, though soon abandoned, was followed in a few other cases:

States v. *Utah*, 283 U. S. 64, 89, that the "findings of the Master . . . are justified by the evidence"; and in *Kansas* v. *Missouri*, 322 U. S. 213, 232, that the Master's judgment "accords with the conclusions we make from our own independent examination of the record." And see *United States* v. *Oregon*, 295 U. S. 1, 29. It has at times been argued that original jurisdiction should not be taken, because of the waste of judicial time by this Court: "In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 470 (Stone, C. J., dissenting). The majority opinion did not dispute that claim but gave special reasons why original jurisdiction was necessary in that case. *Id.*, at 465–466. The findings of the Special Master are of course entitled to respect and their weight will be increased to the extent that credibility of witnesses is involved, as he saw them and heard them, while we have only a cold record. Credibility, however, seems to play no part here. The record

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See 1 H. Carson, History of the United States Supreme Court 169 n. 1 (1902).

In *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 734, involving a boundary dispute, the Court said: "[W]e may ascertain facts with or without a jury, at our discretion, as the circuit courts, and all others do, in the ordinary course of equity" or alternately "a commission of boundary" may be awarded.

In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 9 How. 647, a commissioner was appointed to hold hearings and report to the Court, Pennsylvania having complained of the erection of a bridge across the Ohio River at Wheeling.

While commissioners were appointed in the early years, the practice this century has been to use Special Masters.

consists of maps and of testimony of witnesses. Those testifying for Mississippi qualified as eminent experts. Those testifying for Arkansas were in part experts and in part countrymen who for years knew Luna Bar, frequented it, and studied it. The experts of Mississippi state a plausible explanation that bolsters the theory of accretion. But the countrymen with their physical evidence convince me that the Mississippi River acted in an unprecedented way, found an old channel and in one convulsive operation invaded Arkansas, leaving Luna Bar an island carved out of Arkansas.[2]

There is evidence taken from borings that the soil of the island is not compatible with the soil that would result from accretion. An expert, Dr. Clarence O. Durham, head of the Geoscience Department of Louisiana State University spent two days on the island. He concluded that prior to 1823, the date of the first Federal Land Office Survey, the river had flowed west of the island but that between 1823 and 1871 the channel at that point was not divided. He reached this conclusion from an 1872 map

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[2] The Master found that Arkansas' proof failed to justify a finding that there was an abandoned channel which the Mississippi found again in the 1870's. The absence of independent evidence of such a channel is not surprising, in view of the quality of the maps made before the 1870's. For example, the Master attaches as appendices to his report six maps of the area charted before the 1870's. All of them trace the outline of the Mississippi for navigational purposes. But none are topographical maps which would show the existence of an ancient, dry, low-lying channel on the Arkansas mainland into which the Mississippi could divert. This, however, does not show that such a channel did not exist or refute the physical evidence which Arkansas has mustered. Just as Arkansas has not produced a pre-1870 map proving the prior existence of the ancient channel, Mississippi directs us to no map to prove that such a channel did not exist.

which showed an abrupt shift of the Arkansas western bank into an abandoned prehistoric channel of the river. The island is the hard base of an ancient clay plug that dates prior to 1823. The ancient cypress stumps on the Arkansas mainland and those on the west side of the island are compelling evidence that the island and the mainland were connected for some centuries. To say that the island was formed by accretion is to use magic to make the ancient cypress stumps on the island disappear. Those trees are of the climax species; and the experts all agree that where climax trees appear the land mass on which they grow is at least 150 years old. The trees found on the high ground of the island were black walnut and red mulberry. Those trees were there prior to 1800 which would be impossible if Luna Bar was the product of accretion in modern times.[3] The hard core

[3] The Master stated that the testimony about vegetation and the age of trees on the island was, "as far as I can tell, reasonably comparable" to that presented in two earlier cases concerning the origin of Luna Bar (*Anderson-Tully Co.* v. *Walls,* 266 F. Supp. 804; *Arkansas Land & Cattle Co.* v. *Anderson-Tully Co.,* 248 Ark. 495, 452 S. W. 2d 632). The Master also stated: "It was the position of Mississippi that various stumps found on Luna Bar and Spanish Moss Bend had been brought there by flood waters. Its position in such regard was sustained by the courts heretofore considering the matter. I do likewise."

Neither of the earlier cases makes clear the exact extent of testimony admitted, or precisely how it corresponds with the testimony given before the Special Master in the instant case. Arkansas, however, notes that "evidence of the relic trees found on top of the island [was] not discovered at [the time of the earlier litigation], and this record is the only record of their existence." Moreover, it is hardly true that the Arkansas court "sustained" Mississippi's position that the cypress stumps found in Spanish Moss Bend had been carried there by floodwaters. That court, remanding the case to the lower court for further proceedings, noted that the appearance

of the island has an elevation between 133.2 feet and 133.5 feet; and the elevation on the adjacent Arkansas bank is between 132.2 feet and 139 feet.[4] Again there

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of at least two of the stumps in photographs tended to lend support to testimony that they had grown in place. So did the designation of "cypress knees" and "cypress stumps" and trees along the Arkansas shore near the mainland on several early Mississippi River Commission charts. These designations indicated that there was evidence of cypress stumps many years before 1940, when it was contended that they had been floated downriver and left at Luna Bar. 248 Ark., at 502, 452 S. W. 2d, at 637. Finally, the opinion of the District Court in *Anderson-Tully Co.* v. *Walls, supra,* does not even mention the cypress stumps. Therefore, as to the ancient relic stumps found on top of the island and in Spanish Moss Bend, it would not seem that we are forced to overcome the decision of any previous court which has accepted Mississippi's theory about their origin.

On the other hand, Richard Proctor, who has lived in the area of Luna Bar for 91 years, testified that he had fished around cypress stumps in the river which had been there "as long as I been big enough to know." Moreover, he testified that he found a mink in an old cistern on the Bar, the existence of which is quite inconsistent with the Point Bar migration theory.

[4] The fact that an early Mississippi River Commission hydrographic survey showed the elevation of Luna Bar to be somewhat lower than that of the land on the west bank of Spanish Moss Bend, the Arkansas side of the river, does not disprove Arkansas' position that Luna Bar originated as a portion of the Arkansas mainland which was severed by avulsion. Reference to Appendix A of the Court's decree, a topographic map prepared by the Army Corps of Engineers, shows the rolling nature of much of the land adjacent to the Mississippi River in the area of Luna Bar and indicates that a difference in elevation between two points would not be startling. Moreover, it appears that in 1874, between the time when Arkansas claims the avulsion occurred and the time the Mississippi River Commission conducted its survey, there was a flood in the Mississippi which would have washed at Luna Bar. See *Arkansas Land & Cattle Co.* v. *Anderson-Tully Co., supra,* at 506, 452 S. W. 2d, at 639.

is a compelling inference that while accretion may have added some soil to the island, the high hard core of the island was once connected with the mainland and severed from it by some abrupt and violent action of the river.

MISSISSIPPI *v.* ARKANSAS

No. 48, Orig. Decided February 26, 1974—
Decree entered February 26, 1974

Opinion reported: *Ante*, p. 289.

DECREE

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Luna Bar, depicted in Mississippi's Exhibits 1 and 2, constituting, respectively, Appendix A and part of Appendix B to the Special Master's report, and appended hereto and hereby made a part of this decree, came into existence by accretion to Carter Point and is, and was, a part of the State of Mississippi.

2. The boundary line between the State of Mississippi and the State of Arkansas in the areas between the upstream and the downstream ends of Tarpley Cut-off is as follows:

> In the abandoned bed of the Mississippi River between the upstream end of the Tarpley Cut-off and the downstream end of Tarpley Cut-off, as defined and identified in Mississippi's said Exhibit 2. The courses and distances of the above-described line are set out in said Exhibit 2.

3. The cost of this suit, including the expenses of the Special Master and the printing of his report, have been paid out of the fund made up of equal contributions by the State of Mississippi and the State of Arkansas and said fund has been sufficient to defray all said expenses to the date of the issuance of the report. Any costs and expenses that may be incurred beyond the amount so contributed by the respective litigants shall be borne by the State of Arkansas.

MISSISSIPPI 1:50,000

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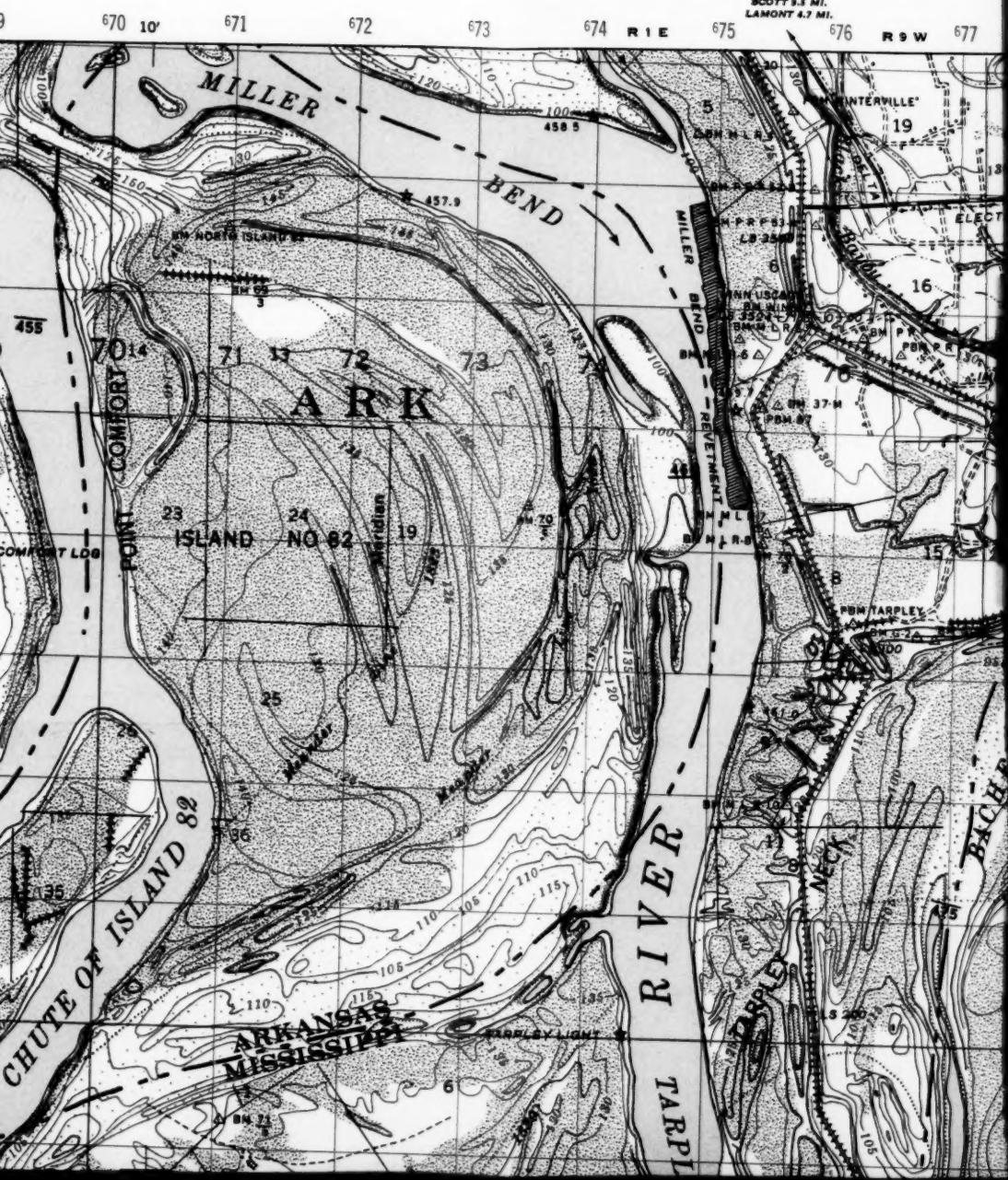
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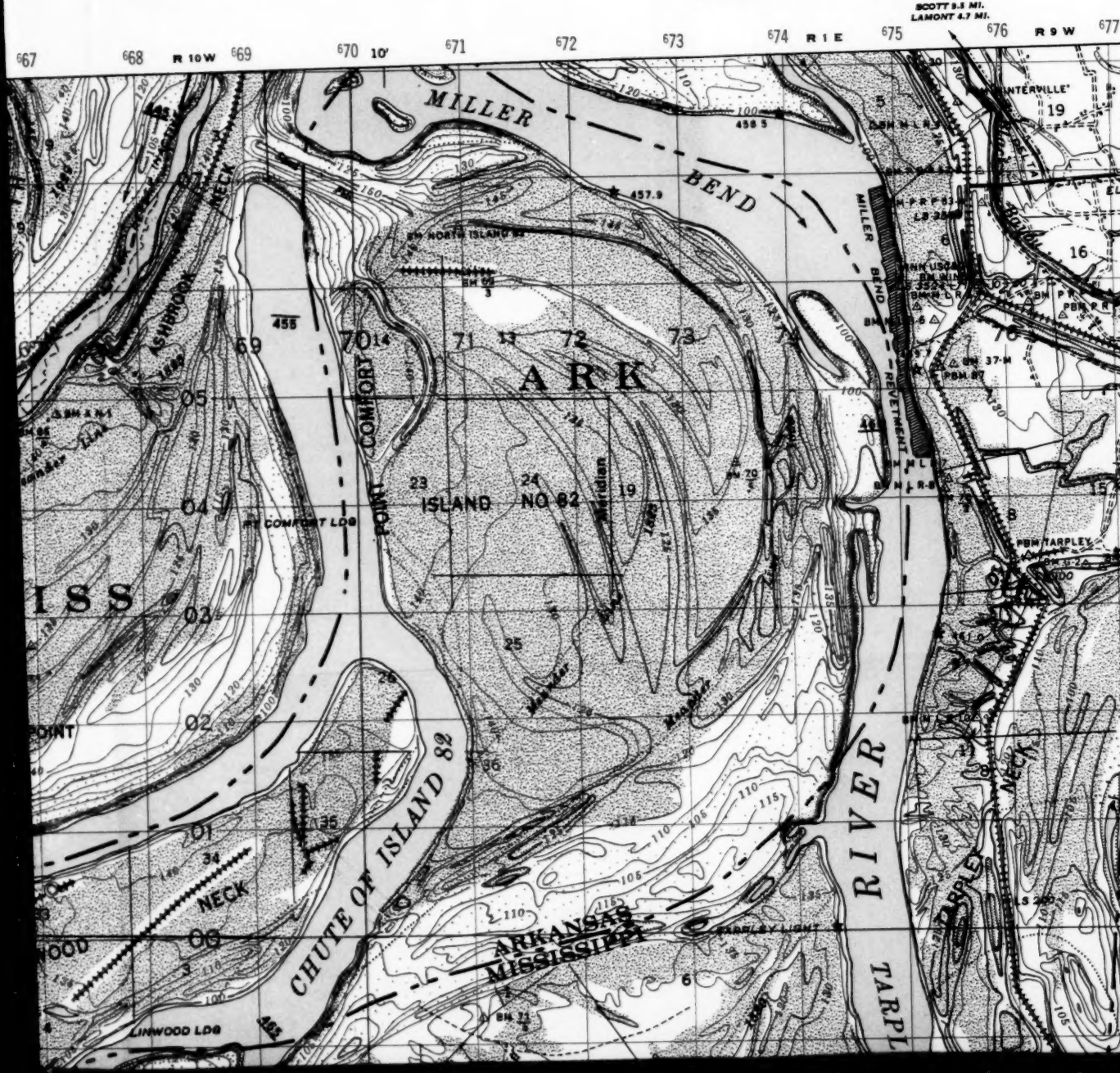
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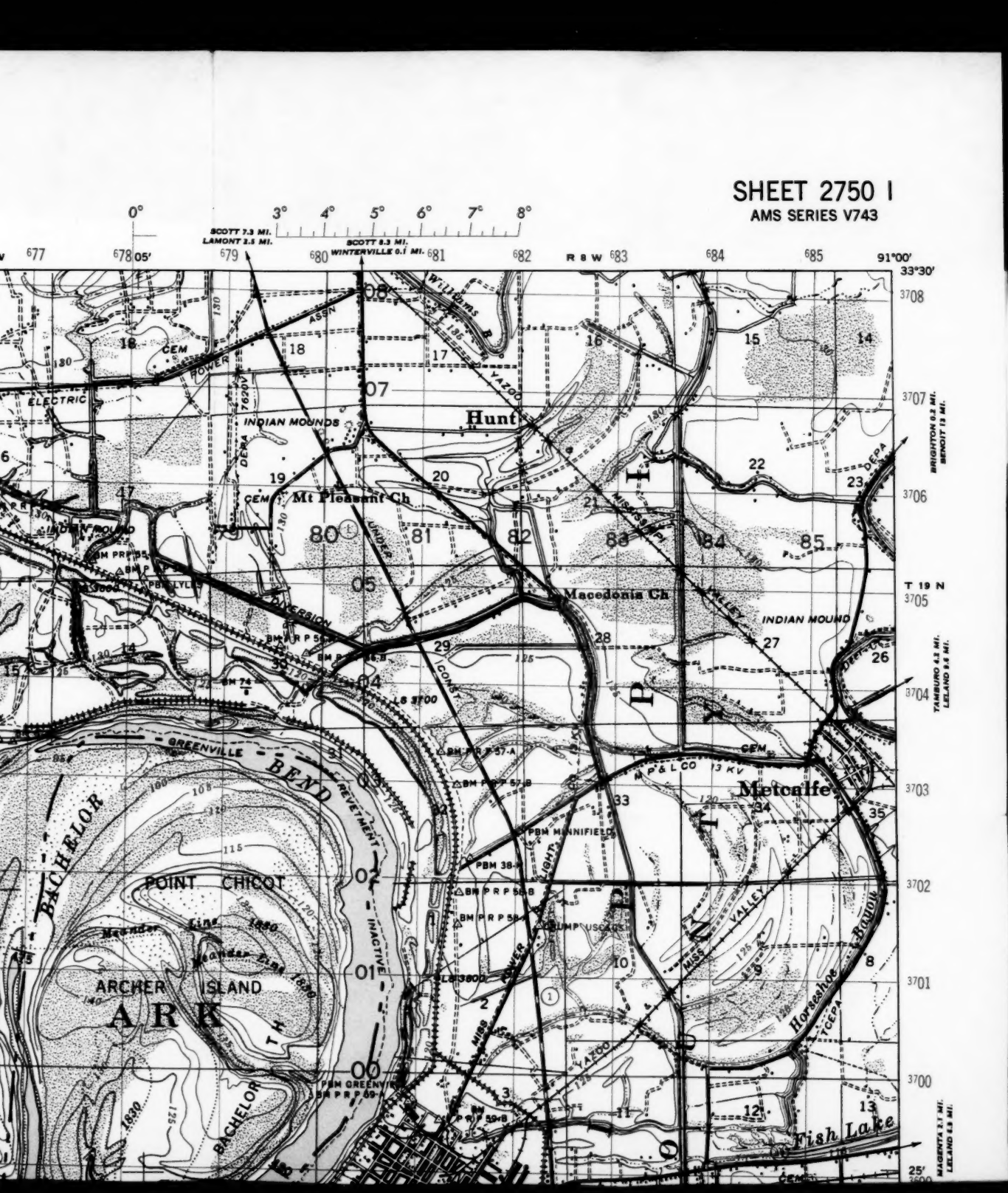
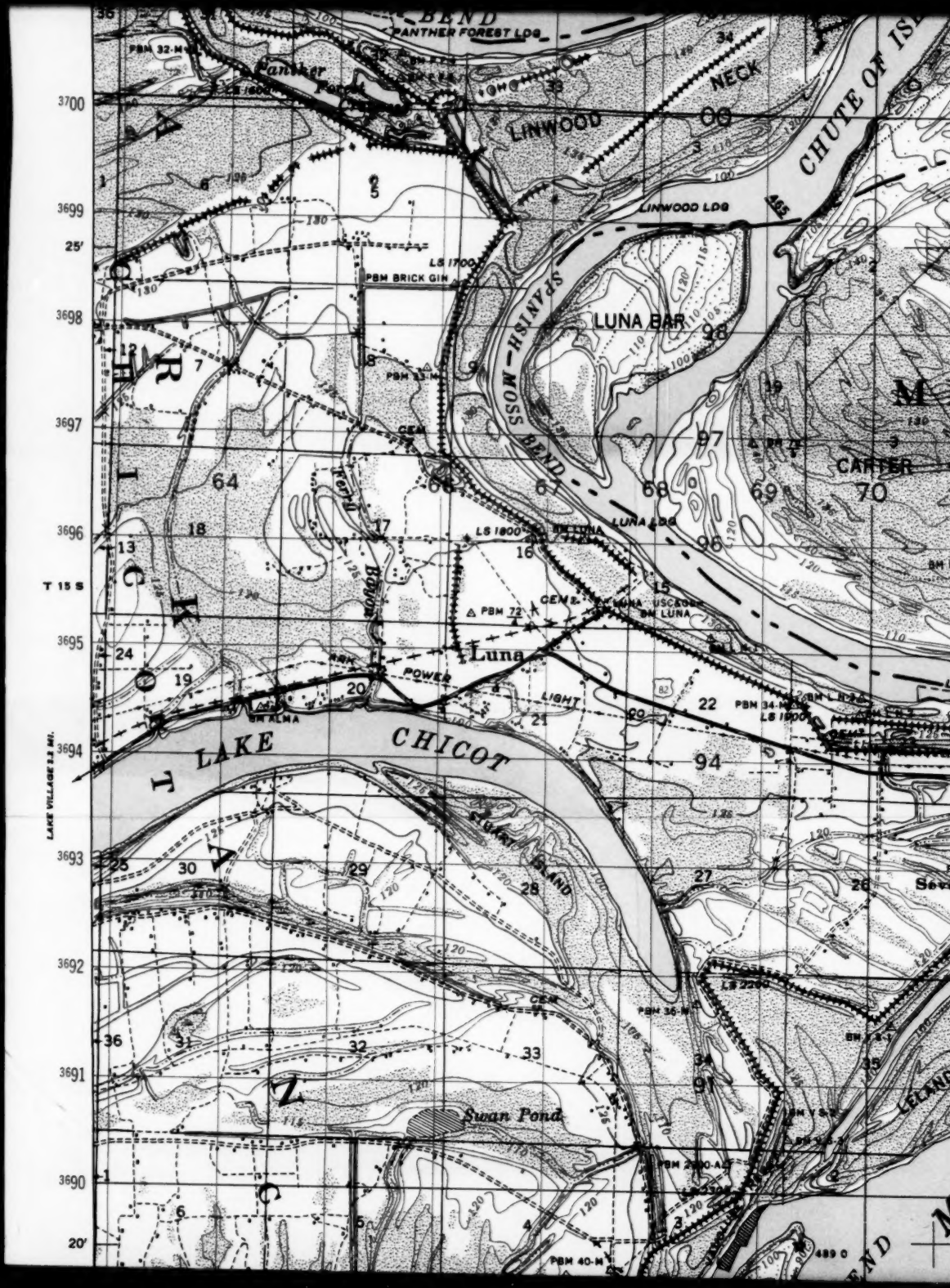

SHEET 2750 I
AMS SERIES V743
SCOTT 7.3 MI.
LAMONT 2.5 MI.
SCOTT 8.3 MI.
WINTERVILLE 0.1 MI.
R 8 W
91°00'
33°30'
Hunt
Mt Pleasant Ch
Macedonia Ch
Metcalfe
INDIAN MOUNDS
INDIAN MOUND
GREENVILLE
BEND
REVETMENT
INACTIVE
POINT CHICOT
ARCHER ISLAND
ARK
BACHELOR
Meander Line 1890
Meander Line 1830
Horseshoe Bayou
Fish Lake
VALLEY
MISS
YAZOO
ELECTRIC POWER
ASSN
DEPA
CEM
T 19 N
BRIGHTON 0.5 MI.
BENOIT 13 MI.
TAMBURO 4.3 MI.
LELAND 9.8 MI.
MAGERO 3.1 MI.
LELAND 4.3 MI.



BEND
PANTHER FOREST LDG
Panther Forest
LINWOOD
NECK
CHUTE OF IS
LINWOOD LDG
LS 1700
PBM BRICK GIN
SPANISH-MOSS BEND
LUNA BAR
CARTER
LUNA LDG
LS 1800
PBM 72
Luna
POWER
LIGHT
LAKE CHICOT
STUART ISLAND
Swan Pond
LS 2200
PBM 36-M
PBM 40-M
PBM 32-M
PBM 33-M
PBM 34-M
LS 1900
T 15 S
LAKE VILLAGE 3.2 MI.
3700
3699
3698
3697
3696
3695
3694
3693
3692
3691
3690
25'
20'

ARCHER ISLAND
ARK
ARKANSAS
MISSISSIPPI
TARPLEY LIGHT
TARPLEY CUT-OFF (1935)
MISSISSIPPI
POINT
LOWER TARPLEY LIGHT
AERIAL CROSSING
LELAND NECK REVET
LELAND CUT-OFF (1933)
SPANISH MOSS BEND LIGHT
TOWER
OPPER LELAND LDG
LOWER LELAND LANDING
LELAND
LA GRANGE REVET
LA GRANGE
La Grange Crevasse
PBM LA GRANGE
FERRY USC&GS
PBM FERRY
WARFIELD REVET
PBM WARFIELD
Seven Star Ch
PBM SEVEN STAR
MISSISSIPPI
BAR
PBM WALKER
NORTH BASE
USC&GS
PBM NORTH BASE
AERIAL CROSSING
TOWER
BACHELOR
Archer Lake
Meander Line
LS 4300
LS 200
LS 400
LS 1900
LS 2100
LS 4300
487.5

CHUTE OF IS
NECK
ARKANSAS
MISSISSIPPI
TARPLEY LIGHT
TARPLEY CUT-OFF (1935)
MISSISSIPPI
CARTER POINT
LOWER TARPLEY LIGHT
AERIAL CROSSING
LELAND CUT-OFF (1933)
LELAND NECK REVET
TOWER
SPANISH MOSS BEND LIGHT
INACTIVE
REVET
NECK
UPPER LELAND LDG
LOWER LELAND LANDING
LELAND
LA GRANGE REVET
La Grange Crevasse
PBM LA GRANGE
FERRY USC&GS
PBM FERRY
WARFIELD REVET
Seven Star Ch
PBM SEVEN STAR
LELAND BAR
MISSISSIPPI
PBM WALKER

ARCHER ISLAND
ARK
BACHELOR
GREENVILLE
Fish Lake
Rising Sun Ch
M P & L CO 13 KV
110 KV
POWER
LIGHT
CO
ASSN
COUNTY ELECTRIC
TWIN
CONST
ELECTRIC
POWER
ASSN
COUNTY
INDIAN MOUND
Ash Bayou
Swiftwater
YAZOO
UNDER
CANAL
TCEPA
Horses
PBM GREENVILLE
PBM 1 USC&GS
PBM CITY CORNER
PBM 2
NORTH BASE
USC&GS
PBM NORTH BASE
AERIAL CROSSING
TOWER
PBM WARFIELD
CEM
MAGENTA 2.1 MI.
LELAND 5.9 MI.
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LELAND 6.9 MI.
LELAND 7.9 MI.
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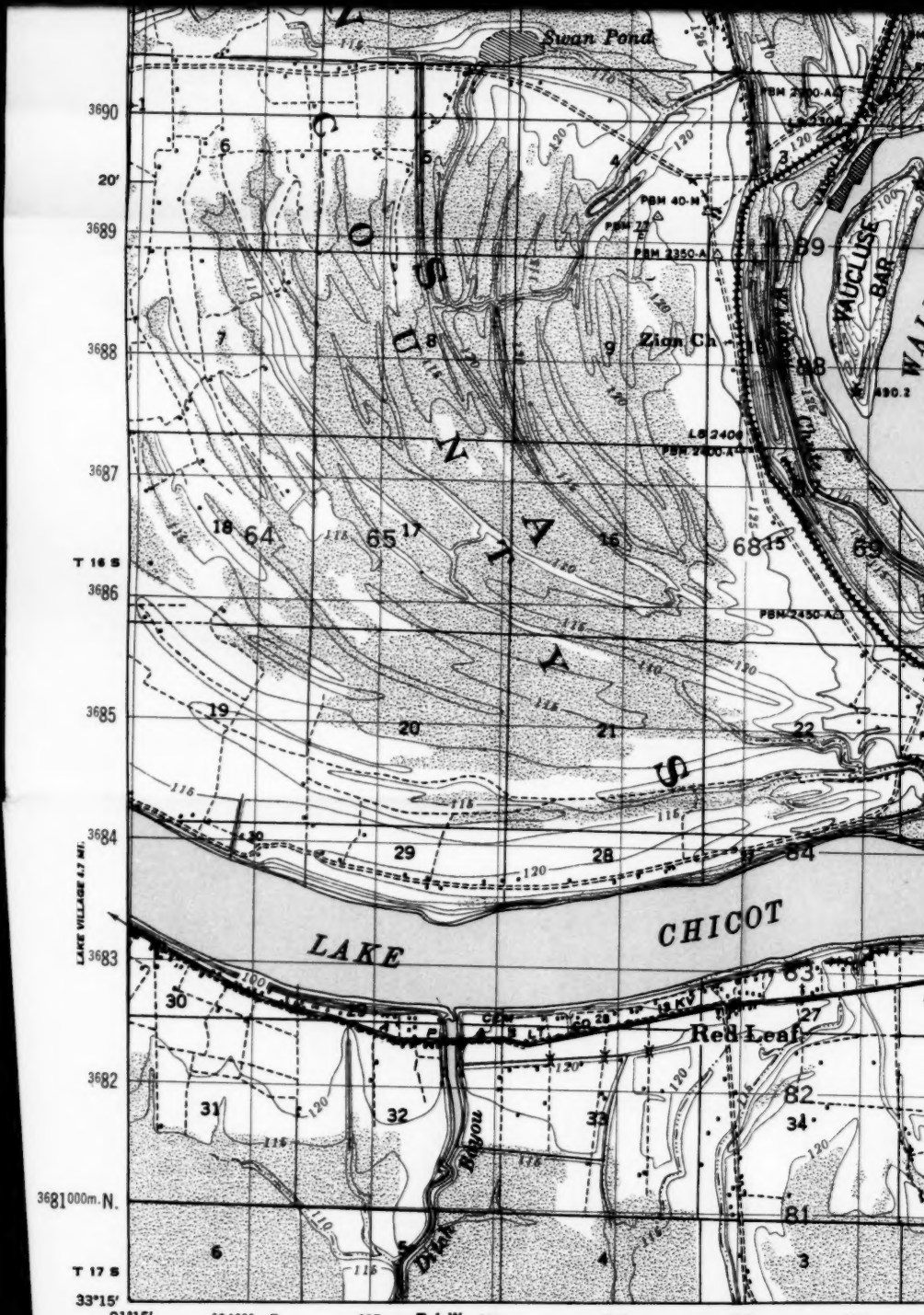

AMS V743
Second Edition–AMS

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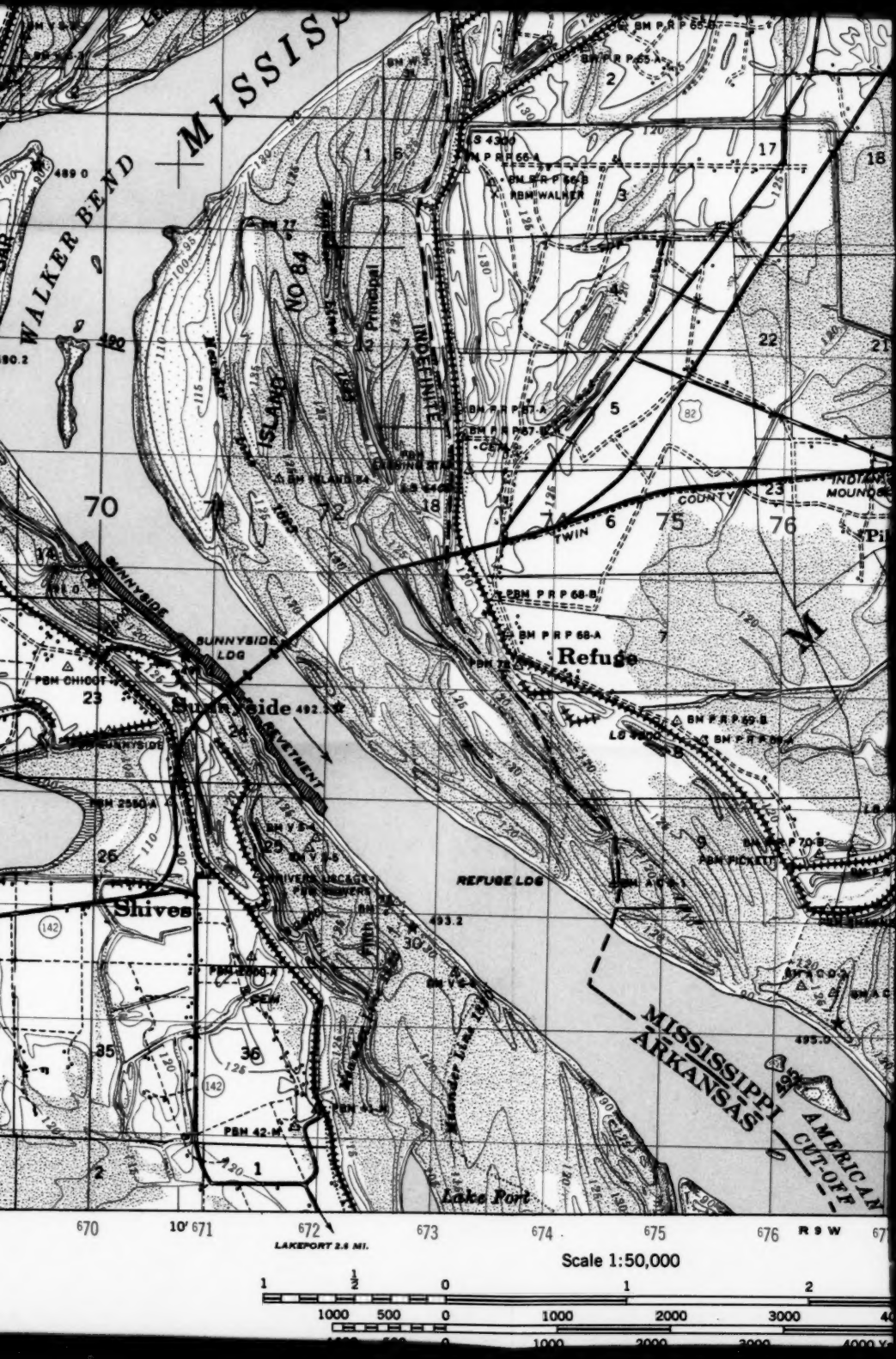
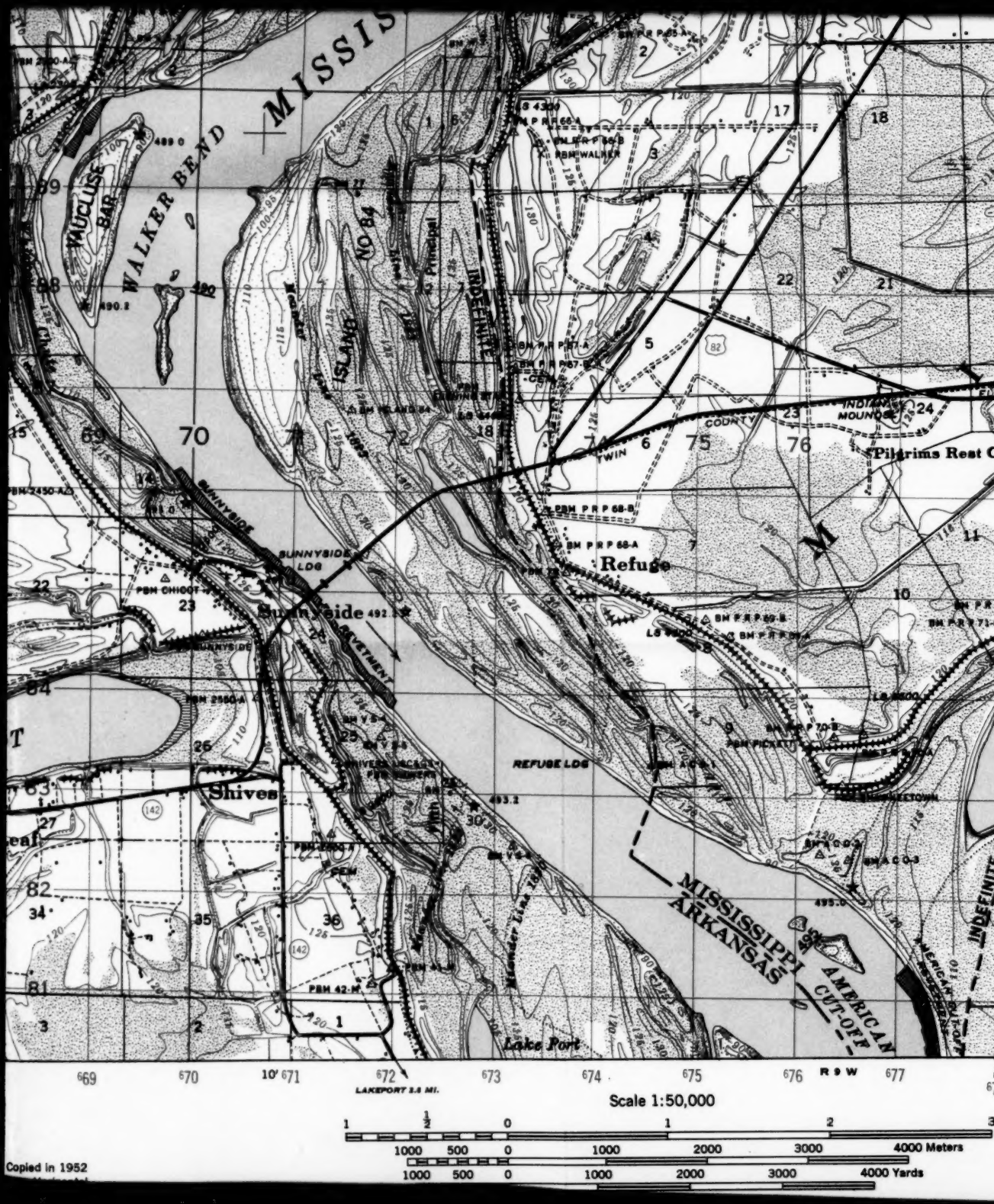

MISSISS
WALKER BEND
ISLAND NO 84
Principal
INDEFINITE
TWIN
COUNTY
INDIAN MOUNDS
Refuge
SUNNYSIDE
SUNNYSIDE LDG
PBM CHICOT
Sunnyside
REVETMENT
REFUGE LDG
Shives
MISSISSIPPI
ARKANSAS
AMERICAN CUT-OFF
Lake Port
LAKEPORT 2.6 MI.
R 9 W
Scale 1:50,000


MISSIS
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VAUCLUSE BAR
ISLAND NO 84
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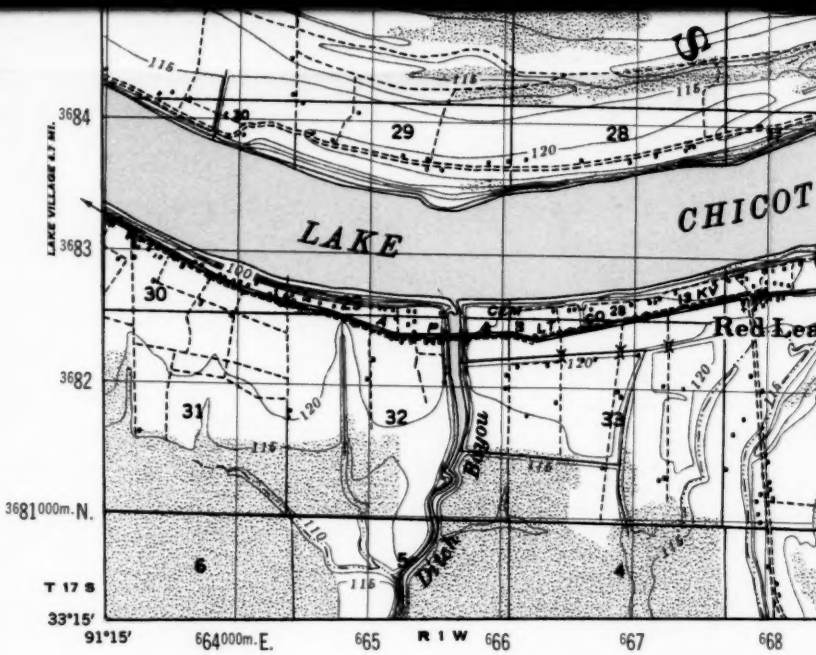
Principal
TWIN
COUNTY
INDIAN MOUNDS
Pilgrims Rest C
Refuge
SUNNYSIDE LDG
SUNNYSIDE
Sunnyside
REVETMENT
REFUGE LDG
Shives
MISSISSIPPI
ARKANSAS
AMERICAN CUT-OFF
Lake Port
LAKEPORT 2.5 MI.
R 9 W
Scale 1:50,000
4000 Meters
4000 Yards
Copied in 1952

PRINTED BY ARMY MAP SERVICE, CORPS OF ENGINEERS, 6-53 . 763801

INDEX TO BOUNDARIES

INDEX TO ADJOINING SHEETS



AMS V743

Second Edition–AMS

Prepared by the Army Map Service (AM), Corps of Engineers, U. S. Army, Washington, D. C. Copi from Mississippi 1:62,500, MRC, Refuge, 1939. Original map compiled by planetable methods. and vertical control by MRC and CE. Public land lines in Arkansas are based on the Fifth Principa public land lines in Mississippi are based on the Choctau Meridian. This map complies with the nation map accuracy requirements. Map field checked, 1939. Scale changed, marginal data revised and Transverse Mercator Grid added, 1952.

LEGEND

ROAD DATA 1939

ROADS

- Hard impervious surface
- Other surface improvements
- Improved dirt or street
- Unimproved dirt
- Trail
- Route markers: Federal; State

Buildings

RAILROADS

- Single track
- Double track
- Narrow gage
- Abandoned (ABANDONED)
- Levee
- Levee station (LS 800)
- Levee milepost (LMP)
- Woodland; Orchard
- Cemetery (CEM)
- Section numbers 2 12

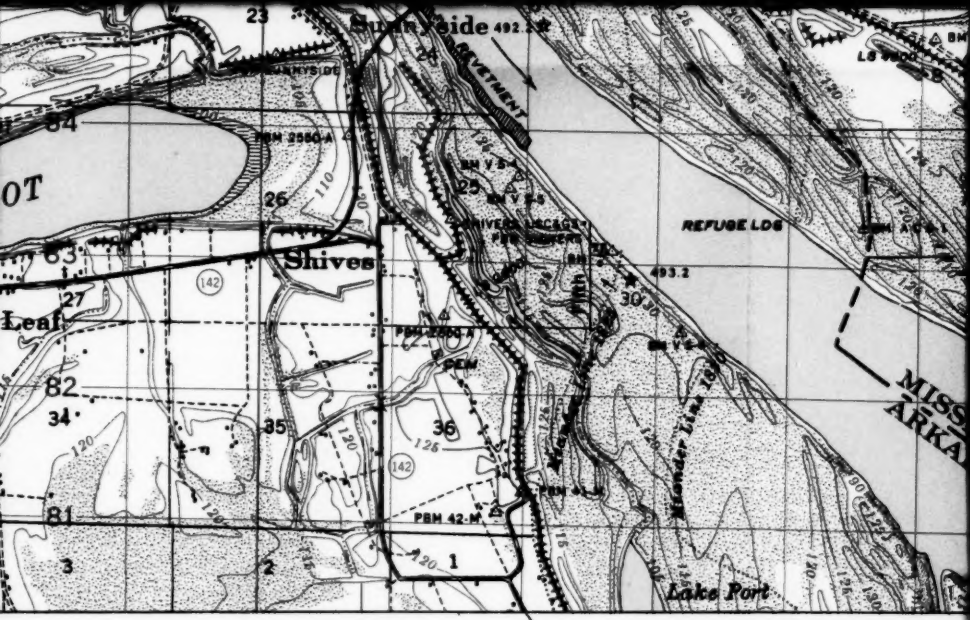
School; Church

BOUNDARIES

- State; With monument
- County
- Reservation
- Land grant
- Engineer District or Division
- Horizontal control point
- Bench mark (× BM 90)
- Spot elevation in feet (47.6)
- Towhead (TH)
- Public land line, reliable

Intermittent lake and stream

- Direction of flow arrow
- Stream mileage
- Retards and dikes
- Dam; With lock
- Lighthouse
- Beacons: Lighted; Not lighted
- River gage; Piles
- Dredged channel
- Revetment
- Marsh or swamp: Salt; Fresh
- Public land line, projected



Scale 1:50,000

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1000 500 0 1000 2000

. Copied in 1952
thods. Horizontal
Principal Meridian;
national standard
l and Universal

CONTOUR INTERVAL 5 F

VERTICAL DATUM: MEAN GULF LEVEL AT BI

TRANSVERSE MERCATOR PRO

HORIZONTAL DATUM: 1927 NORTH AMERI

RED NUMBERED LINES INDICATE THE 1 000 METER U
MERCATOR GRID, ZONE 15

THE LAST THREE DIGITS OF THE GRID NUMBERS A

USERS NOTING ERRORS OR OMISSIONS ON THIS MAP ARE URGED TO MARK HEREON
OFFICER, ARMY MAP SERVICE, WASHINGTON, D. C. MAPS SO FORWARDED WILL

GRID ZONE DESIGNATION: 15S

100,000 M. SQUARE IDENTIFICATION

3700 XH XG

IGNORE the SMALLER figures of any grid number; these are for finding the full coordinates. Use ONLY the LARGER figures of the grid number; example: 36 81 000

TO GIVE A STAND
THIS SHEET TO N

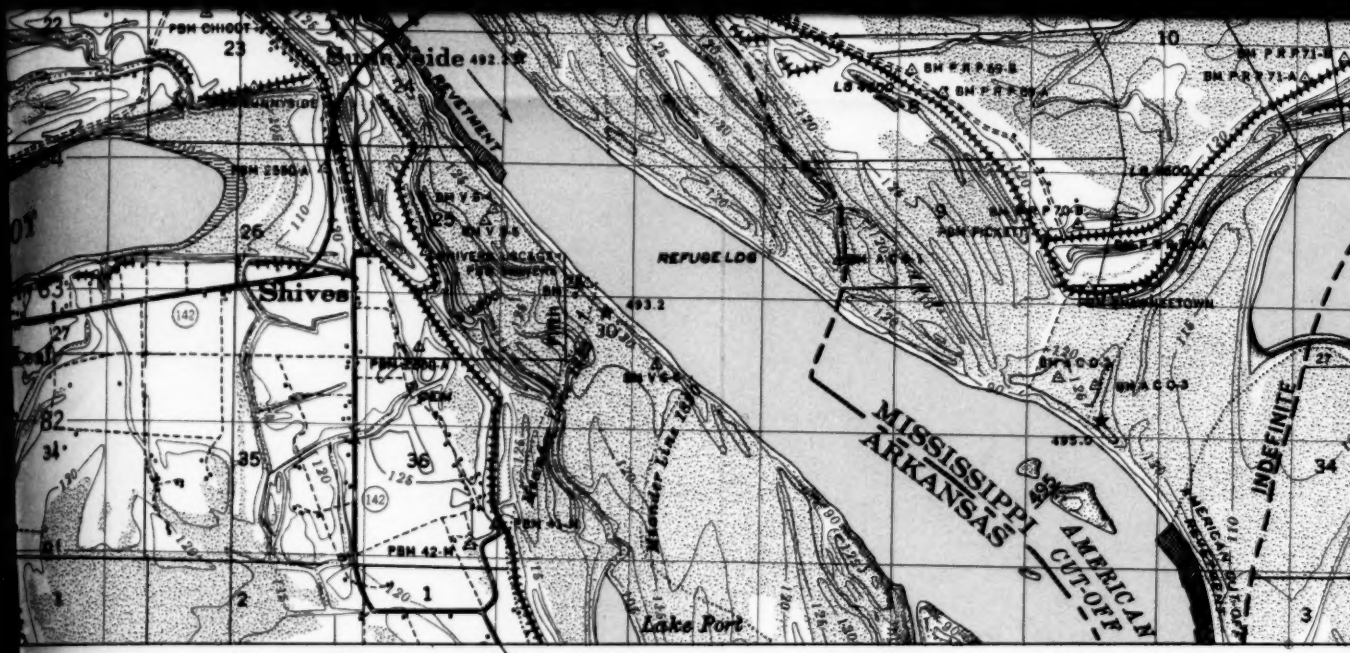
SAMPLE POINT: ROAD INT

1. Locate first VERTICAL grid l
point and read LARGE figure
line either in the top or bott
on the line itself:
Estimate tenths from grid
2. Locate first HORIZONTAL gr
point and read LARGE figur
line either in the left or ri
on the line itself:
Estimate tenths from grid

SAMPLE REFERENCE:

If reporting beyond 100,000
bears an overlapping grid
Meter Square Identification,

If reporting beyond 18° in an
Grid Zone Designation as:



Scale 1:50,000

1 0 1 2 3 Miles

1000 500 0 1000 2000 3000 4000 Meters

1000 500 0 1000 2000 3000 4000 Yards

CONTOUR INTERVAL 5 FEET

VERTICAL DATUM: MEAN GULF LEVEL AT BILOXI, MISSISSIPPI

TRANSVERSE MERCATOR PROJECTION

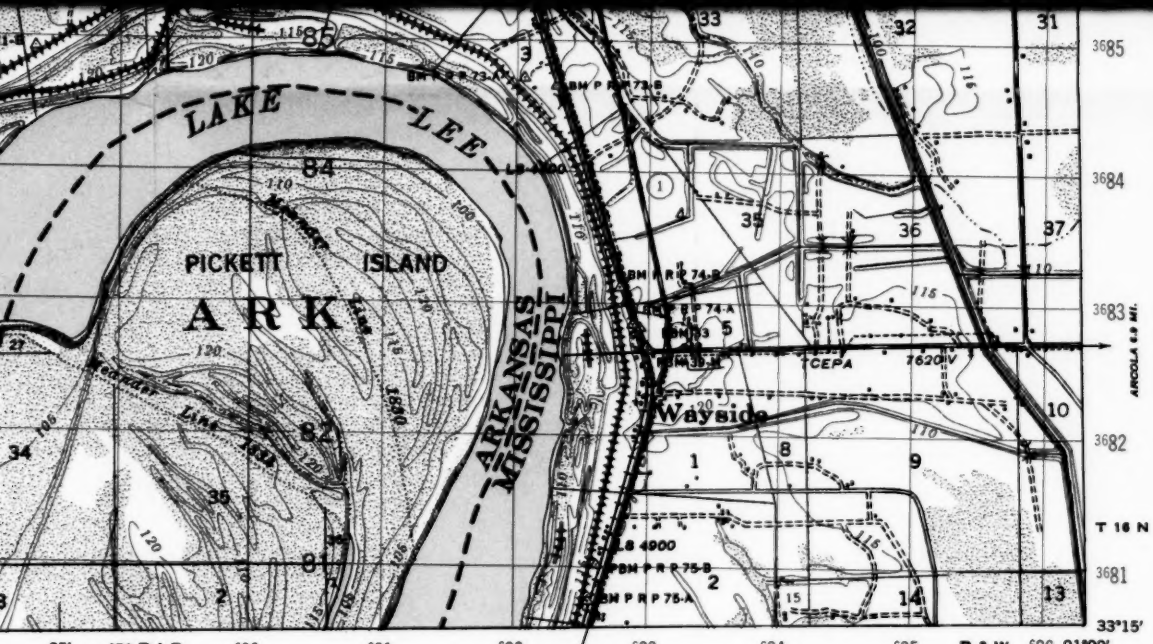
HORIZONTAL DATUM: 1927 NORTH AMERICAN DATUM

RED NUMBERED LINES INDICATE THE 1,000 METER UNIVERSAL TRANSVERSE MERCATOR GRID, ZONE 15

THE LAST THREE DIGITS OF THE GRID NUMBERS ARE OMITTED

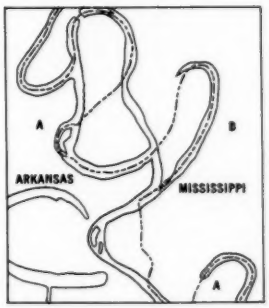
USERS NOTING ERRORS OR OMISSIONS ON THIS MAP ARE URGED TO MARK HEREON AND FORWARD DIRECTLY TO COMMANDING OFFICER, ARMY MAP SERVICE, WASHINGTON, D. C. MAPS SO FORWARDED WILL BE RETURNED OR REPLACED IF DESIRED.

GRID ZONE DESIGNATION: 15S 100,000 M. SQUARE IDENTIFICATION 3700 XH / XG	TO GIVE A STANDARD REFERENCE ON THIS SHEET TO NEAREST 100 METERS SAMPLE POINT: ROAD INTERSECTION	
	1. Locate first VERTICAL grid line to LEFT of point and read LARGE figures labeling the line either in the top or bottom margin, or on the line itself:	77
	Estimate tenths from grid line to point:	6
	2. Locate first HORIZONTAL grid line BELOW point and read LARGE figures labeling the line either in the left or right margin, or on the line itself:	91
	Estimate tenths from grid line to point:	6
IGNORE the SMALLER figures of any grid number; these are for finding the full coordinates. Use ONLY the LARGER figures of the grid number; example: 368 1000 / 92	SAMPLE REFERENCE:	776916
	If reporting beyond 100,000 meters or if sheet bears an overlapping grid, prefix 100,000 Meter Square Identification, as:	XG776916
	If reporting beyond 18° in any direction, prefix Grid Zone Designation as:	15SXG776916



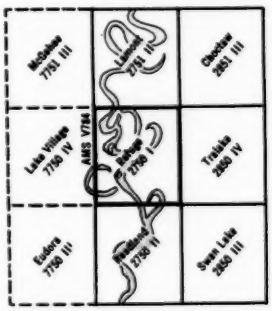
PRINTED BY ARMY MAP SERVICE, CORPS OF ENGINEERS, 6-53, 763801

INDEX TO BOUNDARIES



Arkansas
A. Chicot County
Mississippi
B. Washington County

INDEX TO ADJOINING SHEETS



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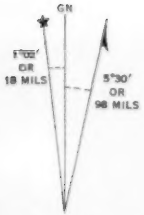
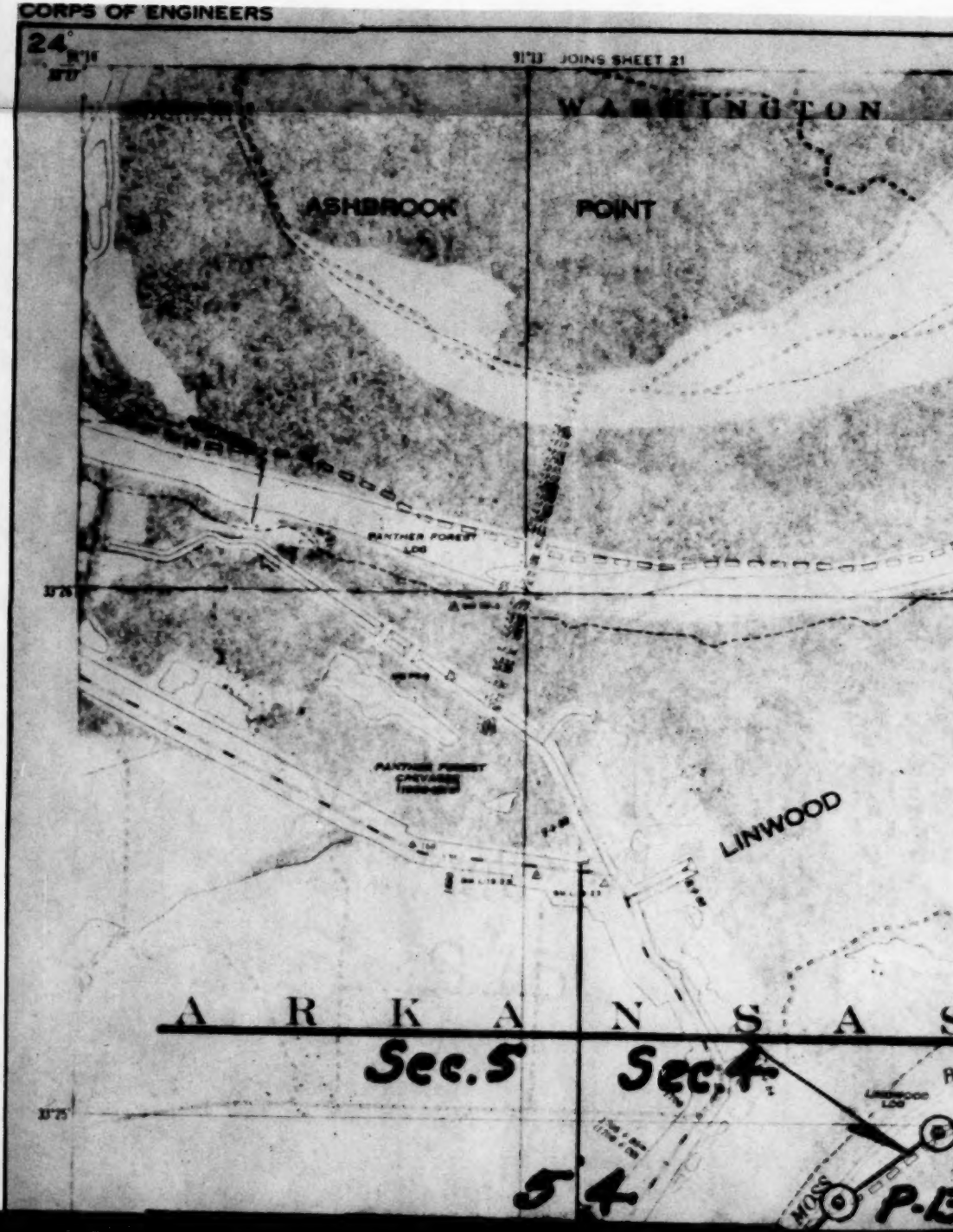


APPROXIMATE MEAN DECLINATION 1952
FOR CENTER OF SHEET
ANNUAL MAGNETIC CHANGE 1' EASTERLY

Use diagram only to obtain numerical values. To determine magnetic north line, connect the pivot point "P" on the south edge of the map with the value of the angle between GRID NORTH and MAGNETIC NORTH, as plotted on the degree scale at the north edge of the map.

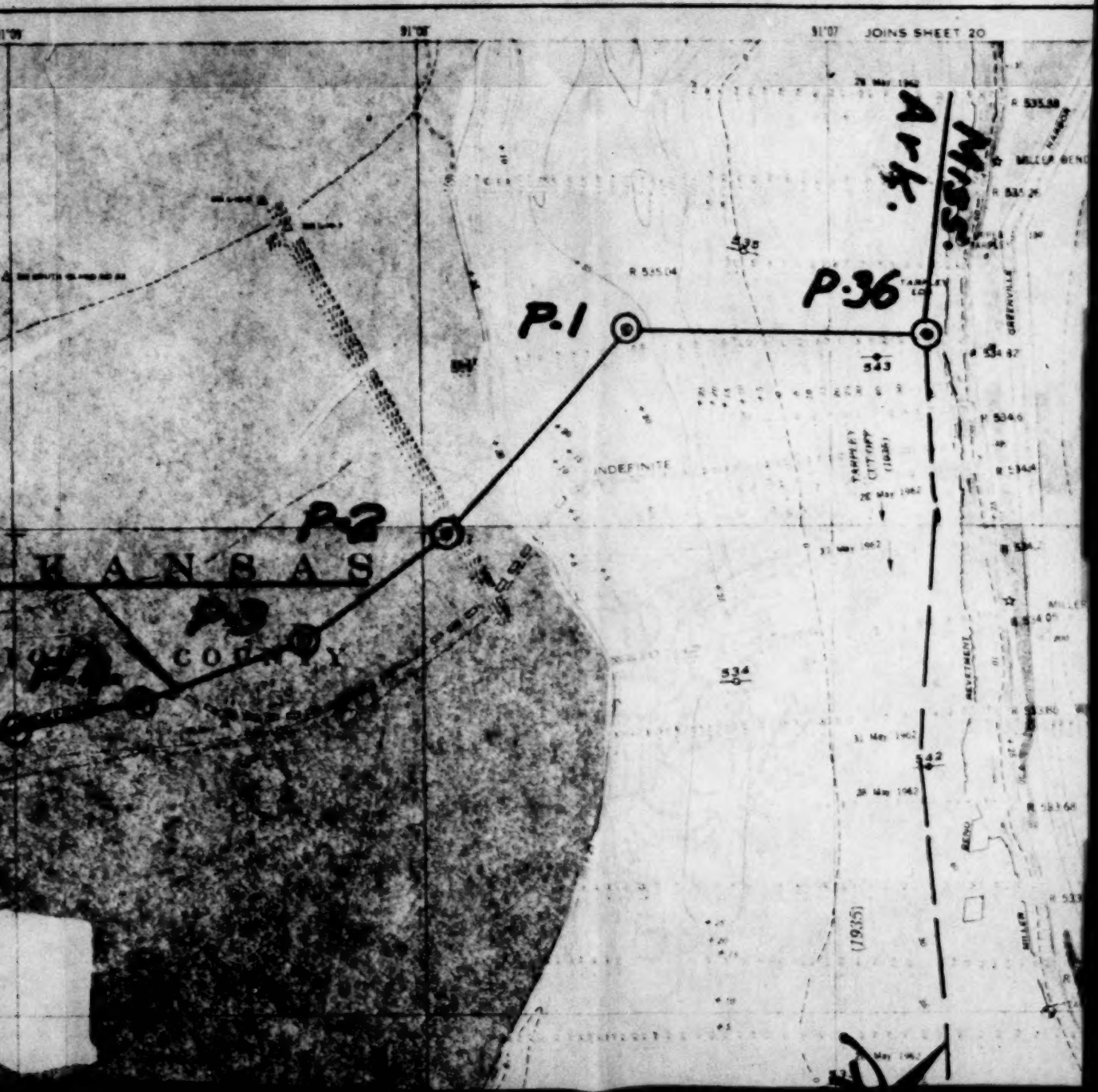
REFUGE, MISS; ARK.

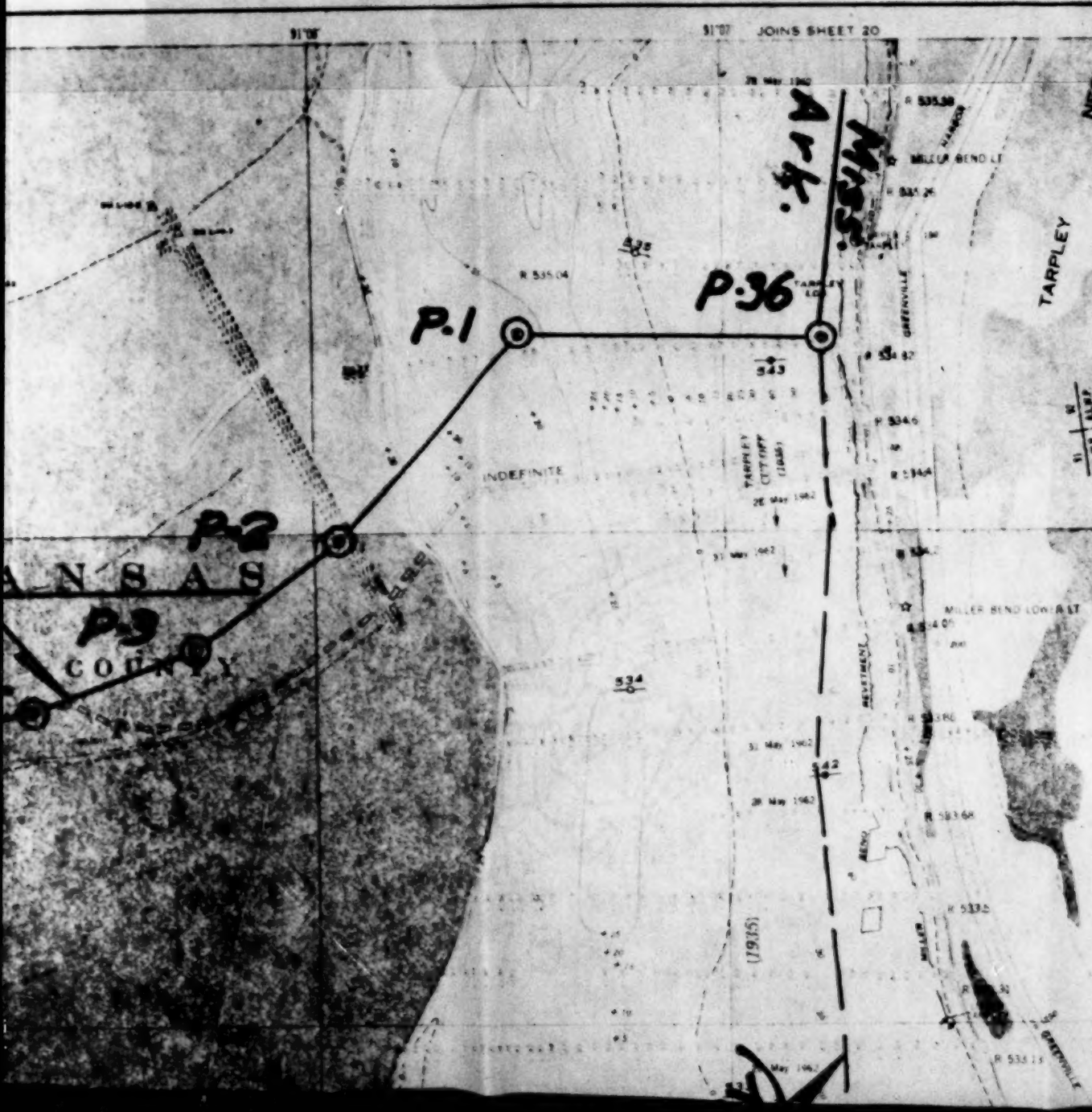
CORPS OF ENGINEERS



CORPS OF
COUNTY
INDEFINITE
A R K
CHICOT
CO
NECK
UNWOOD
NECK
NO 82
ISLAND
CHUTE
OF
INDEFINITE
P-7
P-8
P-9
P-10
P-11
P-12
MISSISSIPPI
ARKAN
BEND

CORPS OF ENGINEERS
COUNTY
INDEFINITE
A R K
CHICOT
CO
LINWOOD
NECK
CHUTE OF ISLAND NO 82
CHUTE OF ISLAND NO 82
INDEFINITE
P-9
P-8
P-7
MISSISSIPPI
ARKANSAS


91°08
91°07
JOINS SHEET 20
Ark.
Miss.
P.1
P.36
P.2
P.3
P.4
KANSAS
COUNTY
INDEFINITE
543
534
(1935)



JOINS SHEET 20
Ark.
Miss.
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P-2
P-3
P-36
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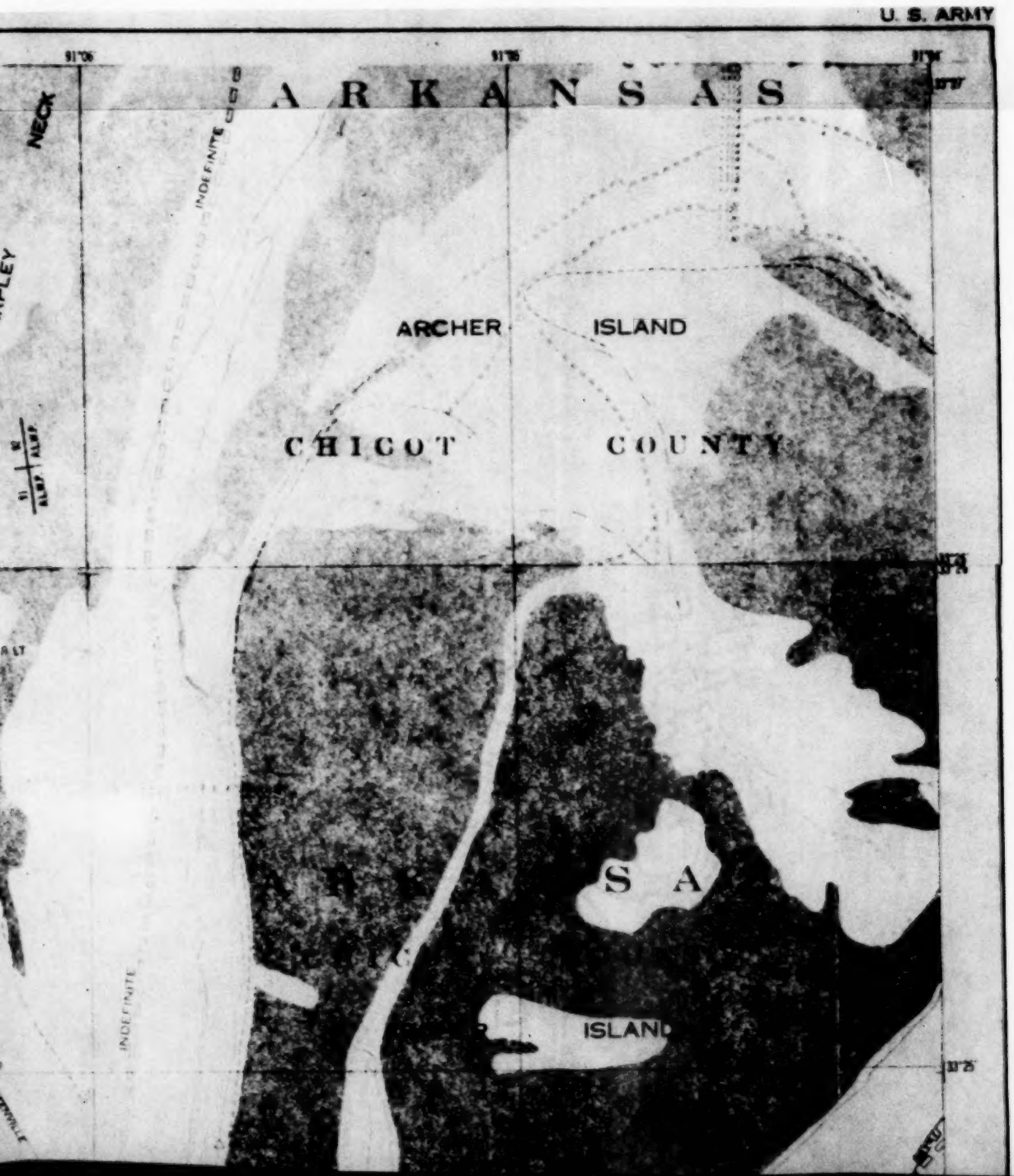
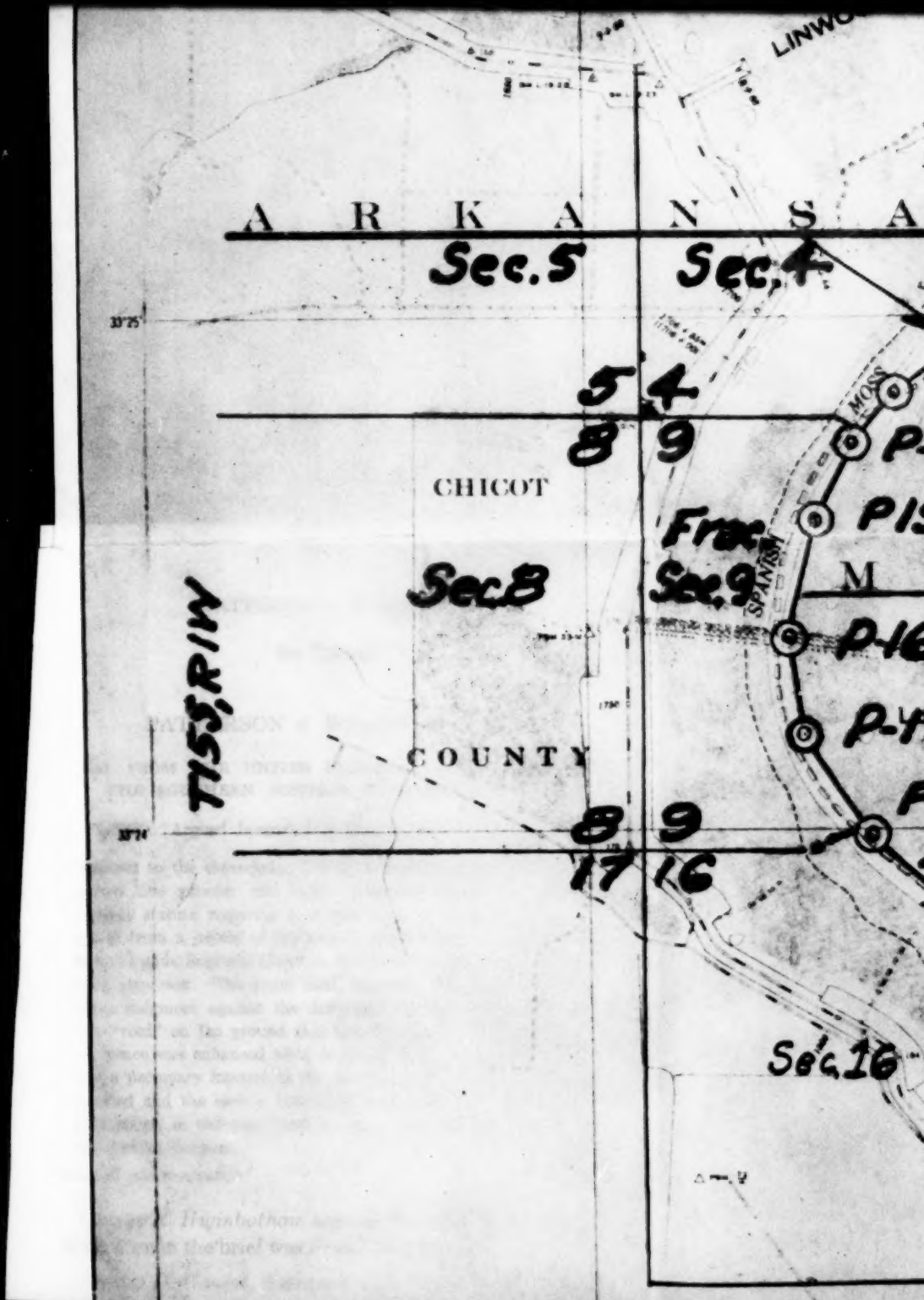
MILLER BEND LT
MILLER BEND LOWER LT
INDEFINITE
ANSAS
COUNTY
GREENVILLE
REVETMENT


U. S. ARMY
ARKANSAS
NECK
INDEFINITE
ARCHER
ISLAND
CHICOT
COUNTY
S A
ISLAND
INDEFINITE



LINWO
A R K A N S A
Sec.5
Sec.4
5 4
8 9
CHICOT
Frac.
Sec.8
Sec.9
SPANISH
MOSS
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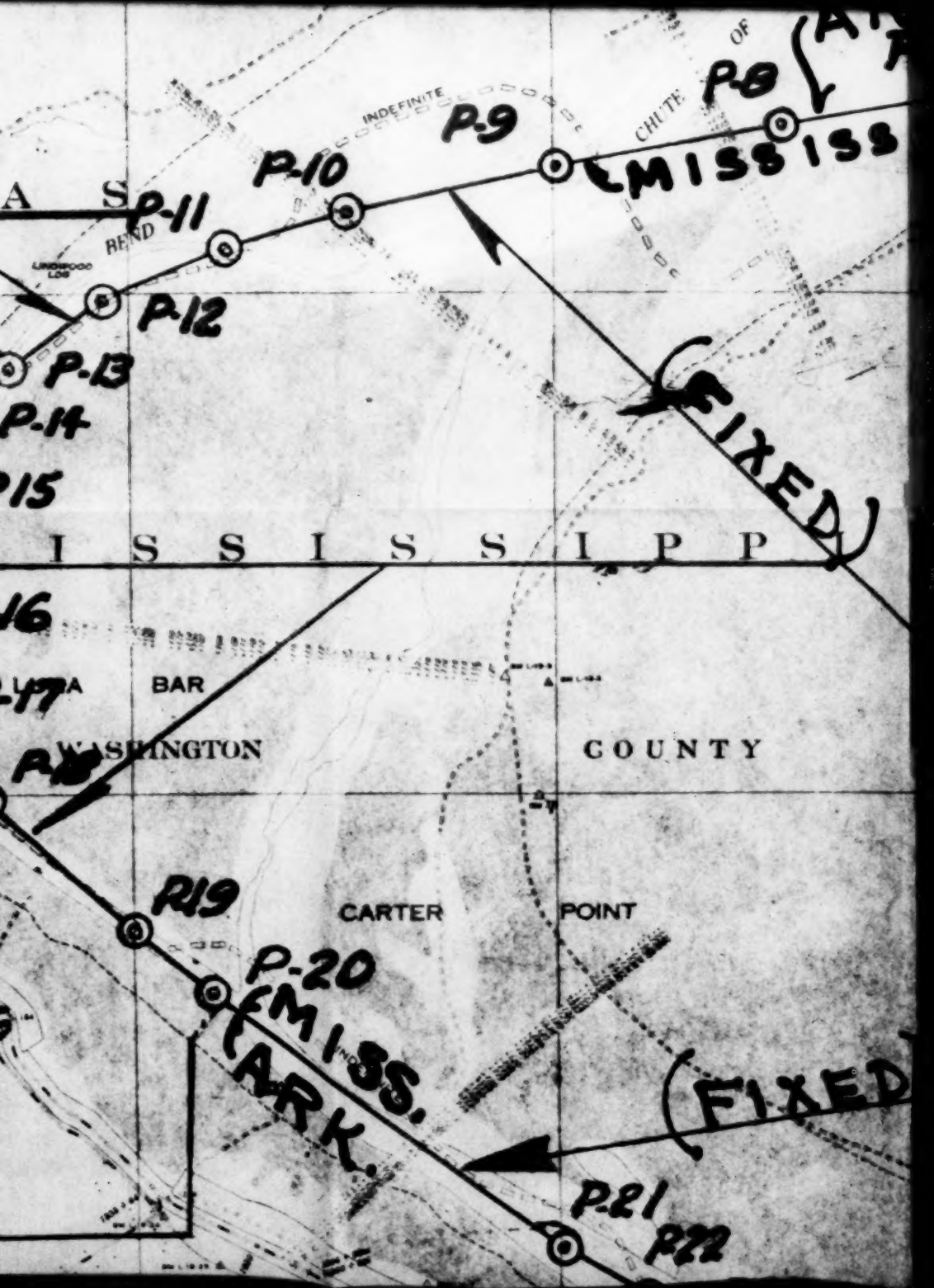
P-16
P-4
COUNTY
T15S,R1W
8 9
17 16
Sec.16


P-8
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FIXED
FIXED
INDEFINITE
CHUTE OF
BEND
BAR
WASHINGTON
COUNTY
CARTER
POINT
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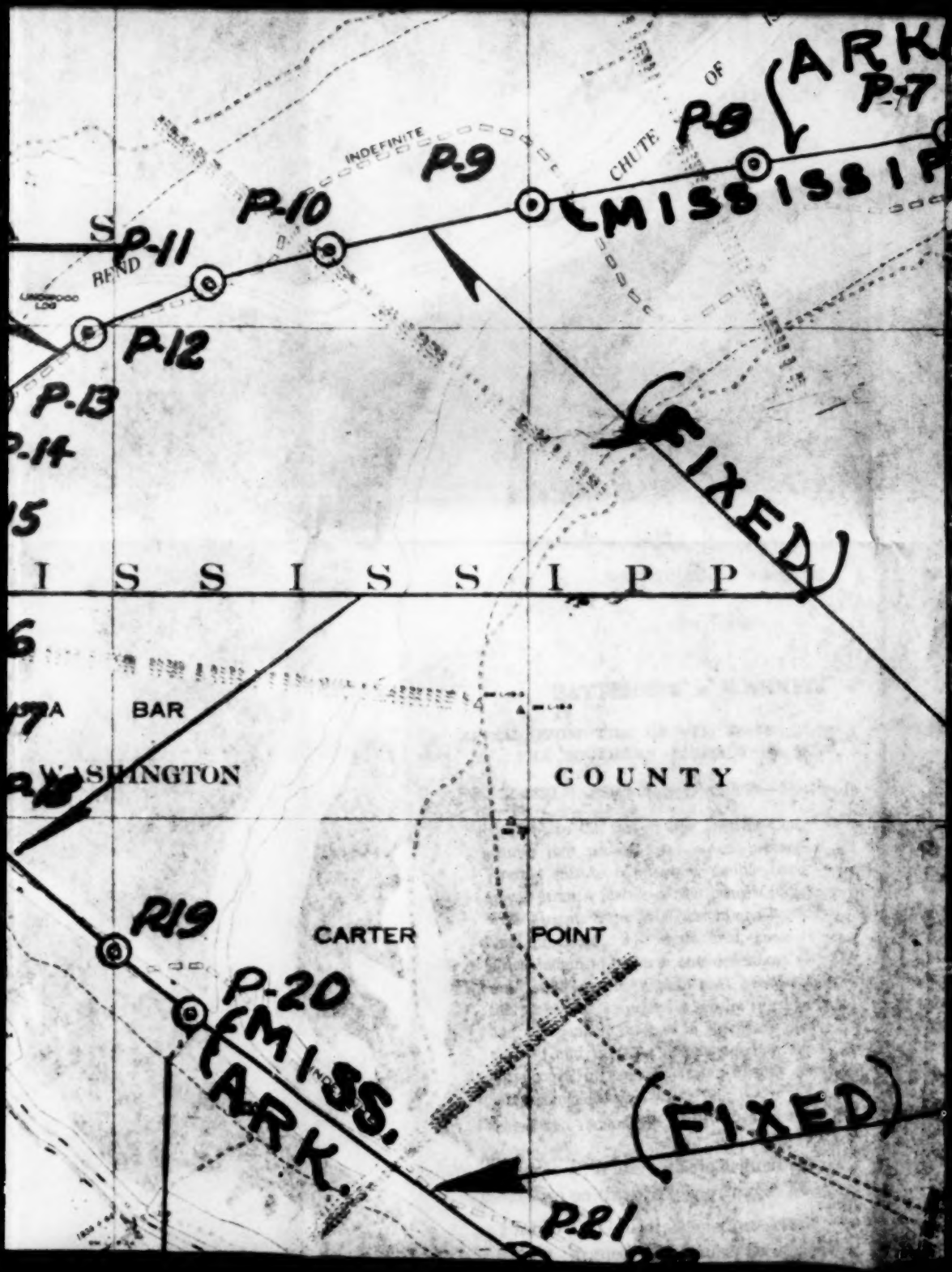

ARKANS
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P-8
CHUTE OF
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P-9
MISSISSIPPI
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15
(FIXED)
I S S I S S I P P I
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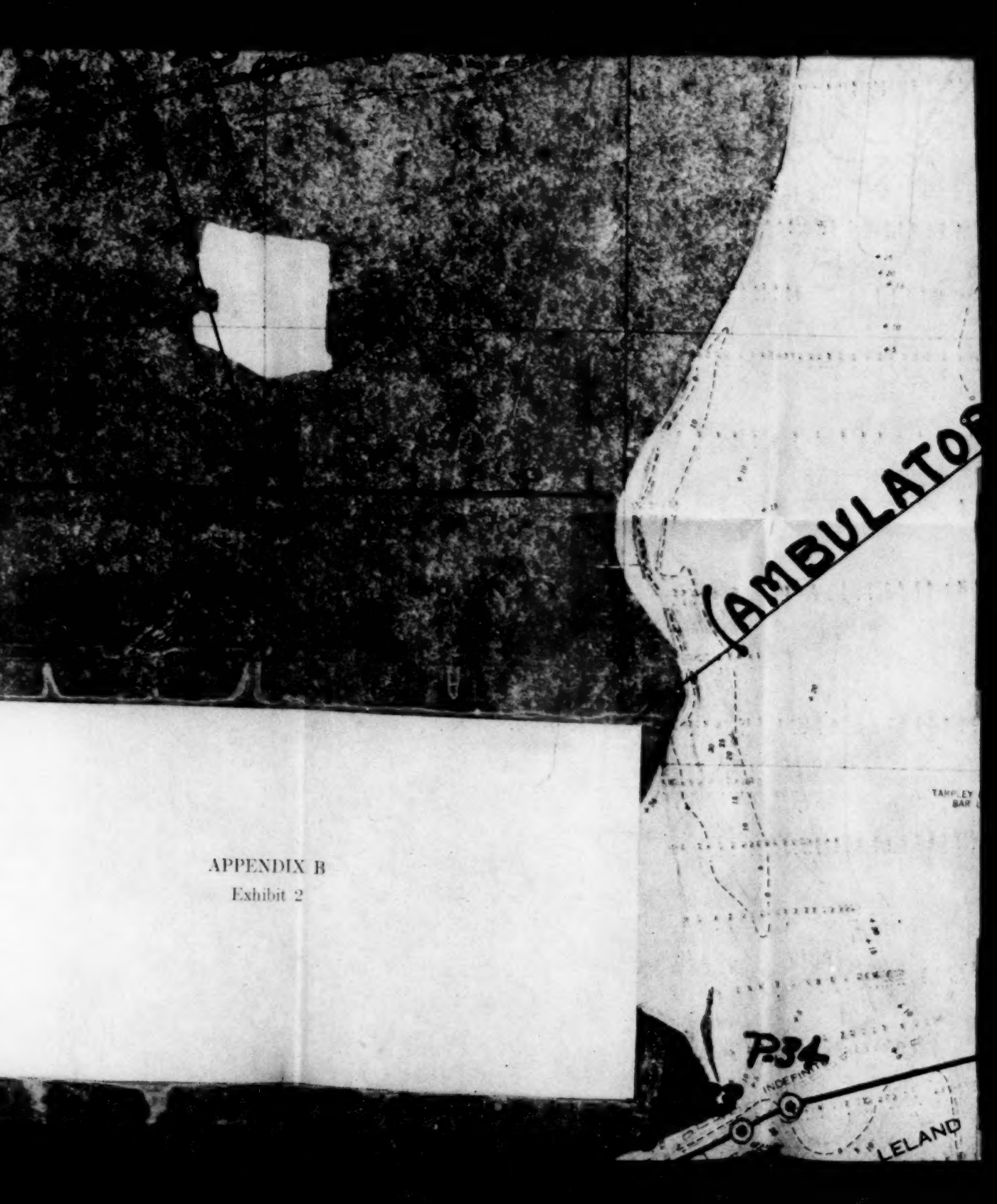
APPENDIX B

Exhibit 2



P-3
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MILLER BEND LOWER LT
534
542
31 May 1962
28 May 1962
(1935)
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541
25 May 1962
20 Feb 1963
TARPLEY
532
TARPLEY ISLAND BAR LT
20 Feb 1963
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540
(1933)
CUT-OFF
P-35

S A
ISLAND
INDEFINITE
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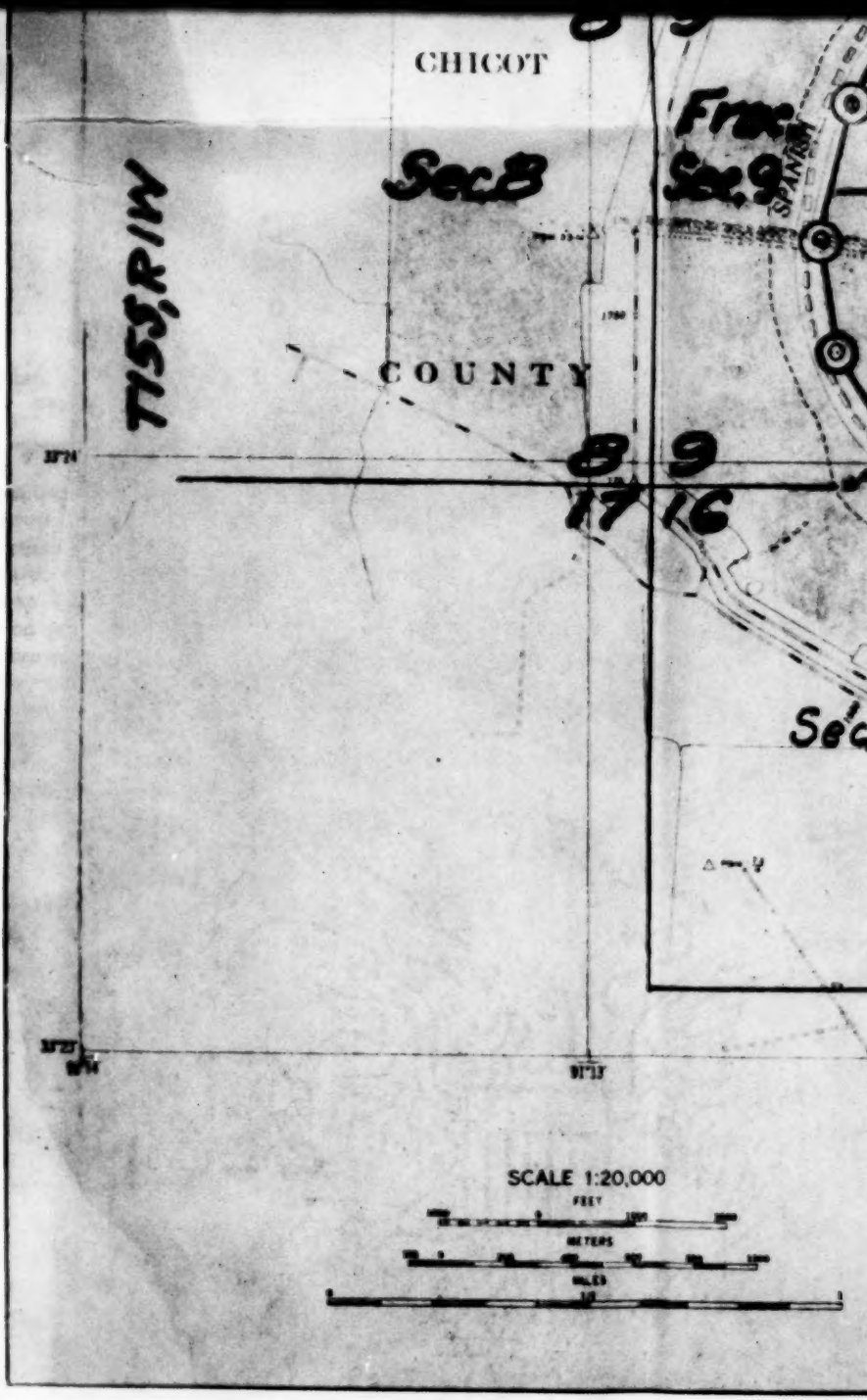
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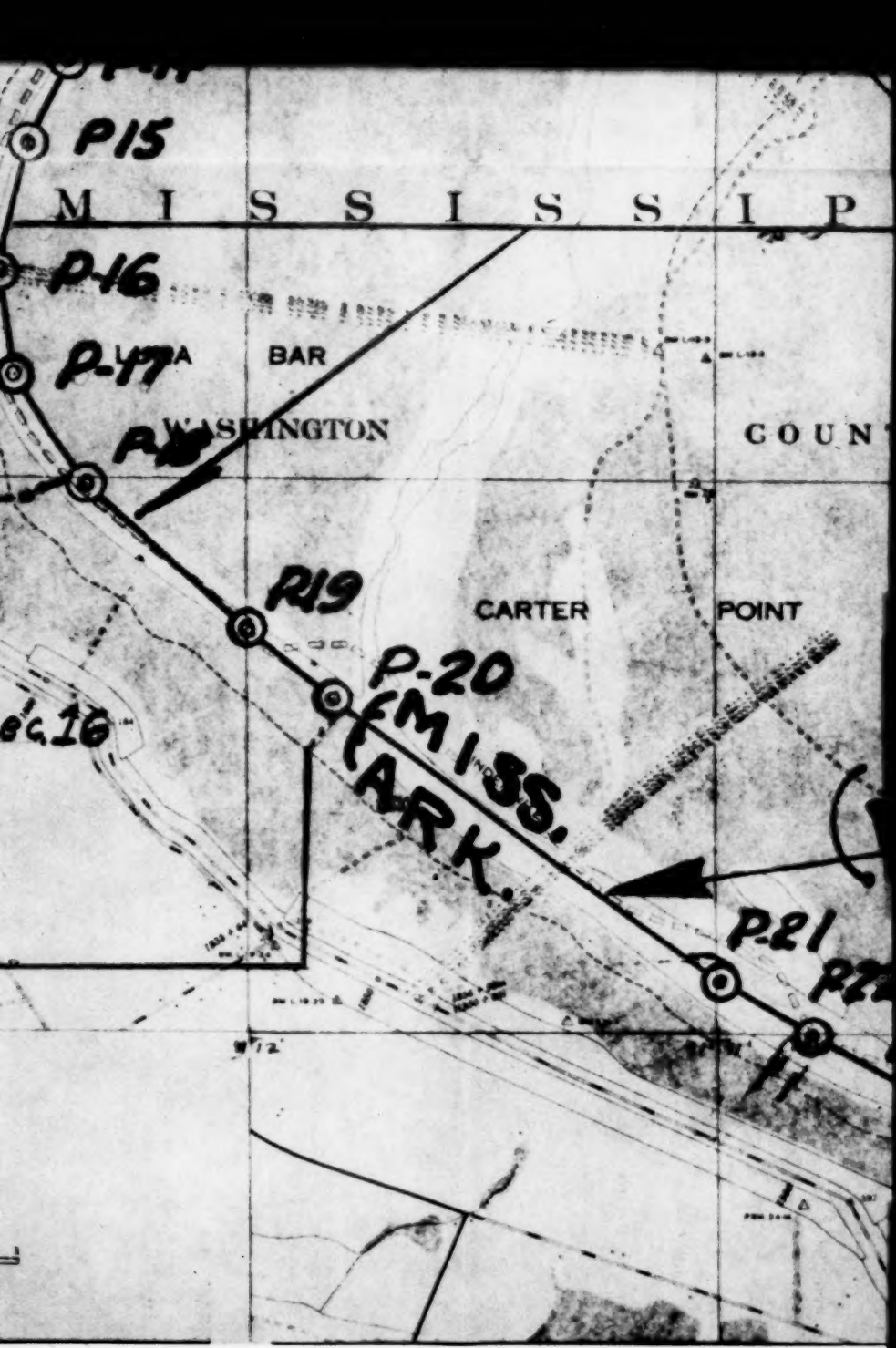
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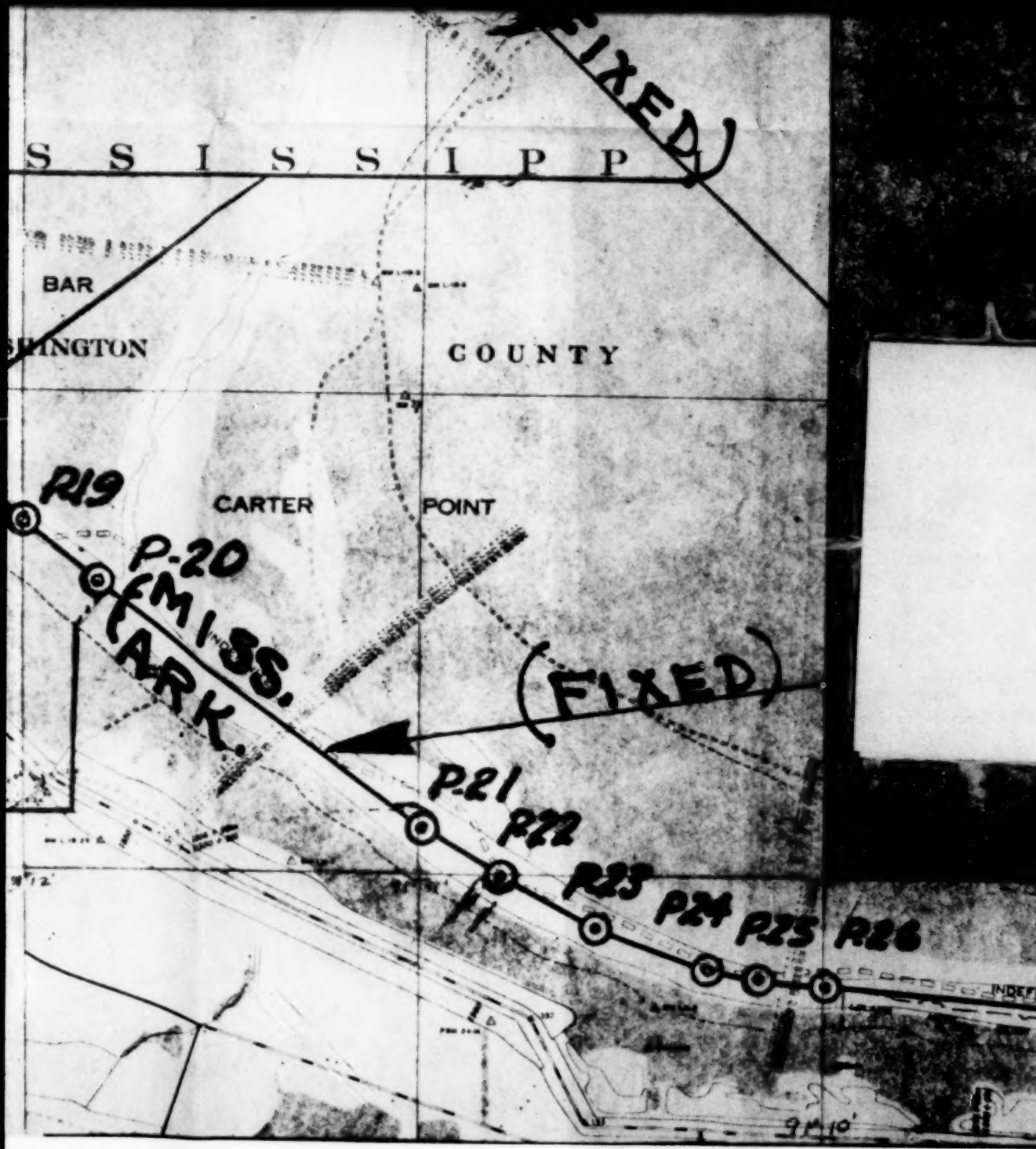
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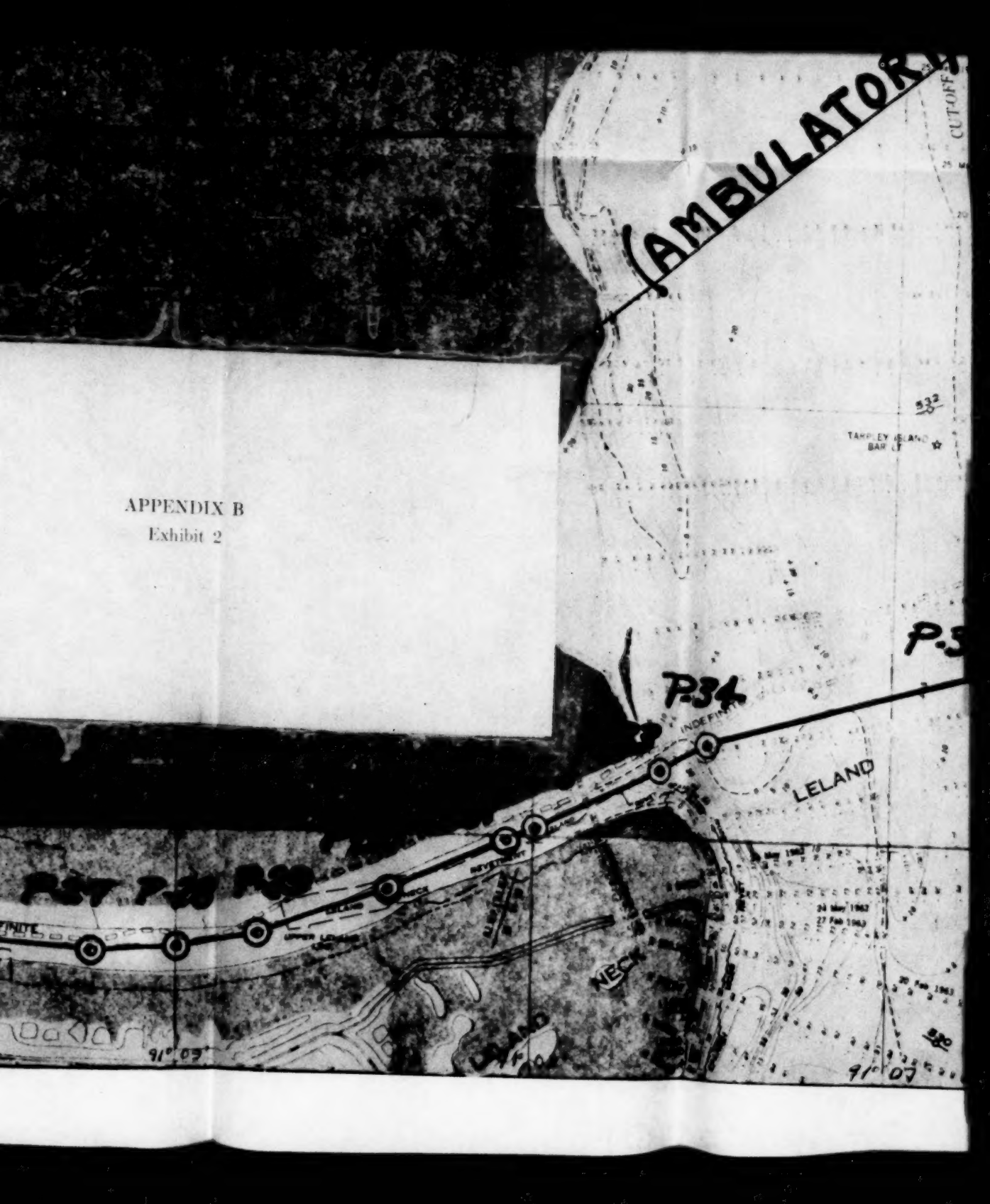
APPENDIX B

Exhibit 2



(AMBULATOR
CUT-OFF
TARPLEY
TARPLEY ISLAND BAR LT
(1933)
CUT-OFF
P-35
P-34
INDEFINITE
LELAND
NECK
LELAND
ARK.
MISS.

MISSISSIPPI RIVER

HYDROGRAPHIC SURVEY

1962-1964

MOUTH OF WHITE RIVER, ARK.
TO BLACK HAWK, LA.

320 TO 595 MILES ABOVE HEAD OF PASSES

IN 108 SHEETS SHEET 28

U. S. ARMY ENGINEER DISTRICT, VICKSBURG 1964

Prepared under the direction of
Lt. Col. James A. Betts, District Engineer

PATTERSON *v.* WARNER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

No. 72–5830. Argued January 9, 1974—Decided February 26, 1974

Subsequent to the three-judge District Court's judgment upholding, against due process and equal protection challenges, a West Virginia statute requiring a double bond as a condition for an appeal from a justice of the peace's judgment in a civil case, the West Virginia Supreme Court in another action upheld the double-bond provision. The court held, however, that a justice of the peace judgment against the defendant violated due process and was "void" on the ground that because the fee of the justice of the peace was enhanced when he ruled in the plaintiff's favor, he had a pecuniary interest in the case's outcome. The judgment is vacated and the case is remanded to the District Court so that that court, in the first instance, may evaluate the effect of the intervening decision.

Vacated and remanded.

George R. Higinbotham argued the cause for appellant. With him on the brief was *Paul J. Kaufman.*

Phillip D. Gaujot, Assistant Attorney General of West Virginia, argued the cause for appellees *pro hac vice.* With him on the brief were *Chauncey H. Browning, Jr.,* Attorney General, *Cletus B. Hanley,* Deputy Attorney General, and *William D. Highland,* Special Assistant Attorney General.

PER CURIAM.

We noted probable jurisdiction in this case, 411 U. S. 905 (1973), because it appeared to present a significant issue, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as to the validity

of that provision of W. Va. Code Ann. § 50–15–2 (1966),[1] requiring a double bond as a condition for an appeal from a judgment entered by a justice of the peace in a civil case. See *Lindsey* v. *Normet*, 405 U. S. 56, 74–79 (1972).

In November 1968 appellant Patterson purchased a used automobile from appellee Graham Motor Company under a deferred-purchase money contract. That portion of the price not paid at the time of purchase was evidenced by a negotiable promissory note. After taking delivery of the automobile but before completion of his payments, Patterson encountered mechanical difficulties with the car. Finding himself unable to obtain satisfaction from Graham, Patterson undertook to reject the purchase, pursuant to W. Va. Code Ann. § 46–2–602 (1966), and made no further payments on the note.

Graham then sued Patterson in appellee Warner's justice of the peace court and, despite a number of defenses asserted by Patterson—breach of warranty, fraud, rightful repudiation, and others—obtained a judgment for $300 plus costs.[2]

---

[1] W. Va. Code Ann. § 50–15–2 provides in pertinent part as follows:

"The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered . . . bond with good security, to be approved by the justice, in a penalty double the amount of the judgment, is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal . . . or if he does not wish to stay the execution on such judgment, with condition to pay the costs of such appeal if the judgment appealed from be affirmed. In case there be judgment before the justice against the plaintiff for costs only, and the plaintiff desires to appeal, the bond shall be for costs, conditioned as aforesaid, and in a penalty not exceeding one hundred dollars. . . ."

[2] Three hundred dollars is the monetary limit of the jurisdiction of a West Virginia justice of the peace in a civil action for the recovery of money. W. Va. Code Ann. § 50–2–1.

Patterson sought to appeal the case to a court of record. Bond was set at $600, double the amount of the judgment, as § 50–15–2 specified. Patterson was unable to find an individual surety and, being indigent, was also unable to raise the amount required by a commercial surety. As a result, the appeal was not perfected and the judgment adverse to him became final.

Prior to execution on the judgment, Patterson instituted this purported class action in the United States District Court for the Southern District of West Virginia against Justice of the Peace Warner and against Graham. He sought injunctive and declaratory relief. A three-judge court was convened and upheld the challenged West Virginia statute. It reasoned that the full hearing before the justice, with the opportunity to present a defense, accorded appellant due process, and that there was no requirement that the State provide appellate review. Turning to equal protection, the court held that a State may properly take steps to insure that an appellant post adequate security to protect a damages award already made, citing *Lindsey* v. *Normet,* 405 U. S., at 77; that an appeal *in forma pauperis* in a civil case is a privilege, not a right; and that "the concept of Equal Protection does not include full and unrestrained appellate review of an initial adjudication which afforded Due Process." Patterson's request for relief was therefore denied.

After probable jurisdiction had been noted here, and shortly prior to the filing of briefs in this Court, the Supreme Court of West Virginia decided *State ex rel. Reece* v. *Gies,* — W. Va. —, 198 S. E. 2d 211 (1973). In *Reece* the portion of § 50–15–2 requiring an appeal bond in an amount double the damages plus one year's rent as a prerequisite to an appeal from a justice court in a suit for unlawful detention of real estate was under constitutional challenge. The West Virginia court, cit-

ing the District Court's decision in the present case and *Greer* v. *Dillard*, 213 Va. 477, 193 S. E. 2d 668 (1973), upheld the bond amount provision, with two of the court's five justices dissenting on that issue, but went on to rule unanimously that the judgment entered against the defendant by a West Virginia justice of the peace was violative of the Due Process Clauses of the Federal and State Constitutions and was "void." — W. Va., at —, 198 S. E. 2d, at 216. Its rationale was that, because the justice's fee was enhanced when he ruled in favor of the plaintiff, he possessed a pecuniary interest in the case's outcome, and the parties therefore were denied a neutral and unbiased judge. See also *State ex rel. Moats* v. *Janco*, 154 W. Va. 887, 180 S. E. 2d 74 (1971).

The judgment entered against appellant Patterson by appellee Warner was rendered pursuant to the same West Virginia statutory scheme that was challenged, in part successfully, in *Reece*. Appellant, upon becoming aware of the *Reece* decision, filed a suggestion of mootness here. Appellee Warner at the time opposed the suggestion. Although that aspect of the case was not addressed in the briefs, it was discussed at oral argument. Tr. of Oral Arg. 3–6, 34–36. Appellant, despite his having made the suggestion of mootness, asserted at oral argument that *Reece* had no retroactive application, and that the judgment entered against him was not void and the case was not moot. *Id.*, at 5. Appellee Warner contended otherwise, *id.*, at 37–38, stating that in West Virginia, under *Falconer* v. *Simmons*, 51 W. Va. 172, 41 S. E. 193 (1902), a State Supreme Court pronouncement, with one exception, is fully retroactive in the sense that it is regarded as always having been the law.

Inasmuch as the decision of the Supreme Court of West Virginia in *Reece* was rendered after the entry of the judgment in the present case, the three-judge District

Court had no occasion to consider whether the decision in *Reece* means that the judgment obtained by Graham against Patterson is void and whether the present case has become moot. We deem it desirable that the District Court, in the first instance, evaluate the effect of that intervening decision. Accordingly, the judgment of the District Court is vacated, and the case is remanded to that court for reconsideration in the light of *State ex rel. Reece* v. *Gies*, — W. Va. —, 198 S. E. 2d 211 (1973). In so doing, we intimate no view as to whether the case is or is not now moot.

It is so ordered.

DAVIS *v.* ALASKA

CERTIORARI TO THE SUPREME COURT OF ALASKA

No. 72-5794. Argued December 12, 1973—
Decided February 27, 1974

Petitioner was convicted of grand larceny and burglary following a trial in which the trial court on motion of the prosecution issued a protective order prohibiting questioning Green, a key prosecution witness, concerning Green's adjudication as a juvenile delinquent relating to a burglary and his probation status at the time of the events as to which he was to testify. The trial court's order was based on state provisions protecting the anonymity of juvenile offenders. The Alaska Supreme Court affirmed. *Held:* Petitioner was denied his right of confrontation of witnesses under the Sixth and Fourteenth Amendments. Pp. 315–321.

(a) The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against petitioner, and limiting the cross-examination of Green precluded the defense from showing his possible bias. Pp. 315–318.

(b) Petitioner's right of confrontation is paramount to the State's policy of protecting juvenile offenders and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Pp. 319–320.

499 P. 2d 1025, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring statement, *post*, p. 321. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 321.

Robert H. Wagstaff argued the cause and filed briefs for petitioner.

Charles M. Merriner argued the cause for respond-

ent. With him on the brief was *John E. Havelock,* Attorney General of Alaska.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to consider whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

(1)

When the Polar Bar in Anchorage closed in the early morning hours of February 16, 1970, well over a thousand dollars in cash and checks was in the bar's Mosler safe. About midday, February 16, it was discovered that the bar had been broken into and the safe, about two feet square and weighing several hundred pounds, had been removed from the premises.

Later that afternoon the Alaska State Troopers received word that a safe had been discovered about 26 miles outside Anchorage near the home of Jess Straight and his family. The safe, which was subsequently determined to be the one stolen from the Polar Bar, had been pried open and the contents removed. Richard Green, Jess Straight's stepson, told investigating troopers on the scene that at about noon on February 16 he had seen and spoken with two Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was later discovered. The next day Anchorage

**William P. Homans, Jr.,* filed a brief for Arthur Bembury as *amicus curiae.*

police investigators brought him to the police station where Green was given six photographs of adult Negro males. After examining the photographs for 30 seconds to a minute, Green identified the photograph of petitioner as that of one of the men he had encountered the day before and described to the police. Petitioner was arrested the next day, February 18. On February 19, Green picked petitioner out of a lineup of seven Negro males.

At trial, evidence was introduced to the effect that paint chips found in the trunk of petitioner's rented blue Chevrolet could have originated from the surface of the stolen safe. Further, the trunk of the car contained particles which were identified as safe insulation characteristic of that found in Mosler safes. The insulation found in the trunk matched that of the stolen safe.

Richard Green was a crucial witness for the prosecution. He testified at trial that while on an errand for his mother he confronted two men standing beside a late-model metallic blue Chevrolet, parked on a road near his family's house. The man standing at the rear of the car spoke to Green asking if Green lived nearby and if his father was home. Green offered the men help, but his offer was rejected. On his return from the errand Green again passed the two men and he saw the man with whom he had had the conversation standing at the rear of the car with "something like a crowbar" in his hands. Green identified petitioner at the trial as the man with the "crowbar." The safe was discovered later that afternoon at the point, according to Green, where the Chevrolet had been parked.

Before testimony was taken at the trial of petitioner, the prosecutor moved for a protective order to prevent any reference to Green's juvenile record by the defense in the course of cross-examination. At the time of the

trial and at the time of the events Green testified to, Green was on probation by order of a juvenile court after having been adjudicated a delinquent for burglarizing two cabins. Green was 16 years of age at the time of the Polar Bar burglary, but had turned 17 prior to trial.

In opposing the protective order, petitioner's counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying petitioner he was on probation for burglary. From this petitioner would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation. Green's record would be revealed only as necessary to probe Green for bias and prejudice and not generally to call Green's good character into question.

The trial court granted the motion for a protective order, relying on Alaska Rule of Children's Procedure 23,[1] and Alaska Stat. § 47.10.080 (g) (1971).[2]

---

[1] Rule 23 provides:

"No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate."

[2] Section 47.10.080 (g) provides in pertinent part:

"The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . . ."

Although prevented from revealing that Green had been on probation for the juvenile delinquency adjudication for burglary at the same time that he originally identified petitioner, counsel for petitioner did his best to expose Green's state of mind at the time Green discovered that a stolen safe had been discovered near his home. Green denied that he was upset or uncomfortable about the discovery of the safe. He claimed not to have been worried about any suspicions the police might have been expected to harbor against him, though Green did admit that it crossed his mind that the police might have thought he had something to do with the crime.

Defense counsel cross-examined Green in part as follows:

> "Q. Were you upset at all by the fact that this safe was found on your property?
>
> "A. No, sir.
>
> "Q. Did you feel that they might in some way suspect you of this?
>
> "A. No.
>
> "Q. Did you feel uncomfortable about this though?
>
> "A. No, not really.
>
> "Q. The fact that a safe was found on your property?
>
> "A. No.
>
> "Q. Did you suspect for a moment that the police might somehow think that you were involved in this?
>
> "A. I thought they might ask a few questions is all.
>
> "Q. Did that thought ever enter your mind that you—that the police might think that you were somehow connected with this?
>
> . . . . .

"A. No, it didn't really bother me, no.

"Q. Well, but . . . .

"A. I mean, you know, it didn't—it didn't come into my mind as worrying me, you know.

"Q. That really wasn't—wasn't my question, Mr. Green. Did you think that—not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had something to do with this, that they might have that in their mind, not that you . . . .

"A. That came across my mind, yes, sir.

"Q. That did cross your mind?

"A. Yes.

"Q. So as I understand it you went down to the—you drove in with the police in—in their car from mile 25, Glenn Highway down to the city police station?

"A. Yes, sir.

"Q. And then went into the investigators' room with Investigator Gray and Investigator Weaver?

"A. Yeah.

"Q. And they started asking you questions about—about the incident, is that correct?

"A. Yeah.

"Q. Had you ever been questioned like that before by any law enforcement officers?

"A. No.

"MR. RIPLEY: I'm going to object to this, Your Honor, it's a carry-on with rehash of the same thing. He's attempting to raise in the jury's mind . . . .

"THE COURT: I'll sustain the objection."

Since defense counsel was prohibited from making inquiry as to the witness' being on probation under a juvenile court adjudication, Green's protestations of unconcern over possible police suspicion that he might

have had a part in the Polar Bar burglary and his categorical denial of ever having been the subject of any similar law-enforcement interrogation went unchallenged. The tension between the right of confrontation and the State's policy of protecting the witness with a juvenile record is particularly evident in the final answer given by the witness. Since it is probable that Green underwent some questioning by police when he was arrested for the burglaries on which his juvenile adjudication of delinquency rested, the answer can be regarded as highly suspect at the very least. The witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold "No" answer would have been given by Green absent a belief that he was shielded from traditional cross-examination. It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination. The remainder of the cross-examination was devoted to an attempt to prove that Green was making his identification at trial on the basis of what he remembered from his earlier identifications at the photographic display and lineup, and not on the basis of his February 16 confrontation with the two men on the road.

The Alaska Supreme Court affirmed petitioner's conviction,[3] concluding that it did not have to resolve the potential conflict in this case between a defendant's right to a meaningful confrontation with adverse witnesses and the State's interest in protecting the anonymity of a juvenile offender since "our reading of the trial

[3] In the same opinion the Alaska Supreme Court also affirmed petitioner's conviction, following a separate trial, for being a felon in possession of a concealable firearm. That conviction is not in issue before this Court.

transcript convinces us that counsel for the defendant was able adequately to question the youth in considerable detail concerning the possibility of bias or motive." 499 P. 2d 1025, 1036 (1972). Although the court admitted that Green's denials of any sense of anxiety or apprehension upon the safe's being found close to his home were possibly self-serving, "the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the youth and pass on his credibility." *Ibid.* The court concluded that, in light of the indirect references permitted, there was no error.

Since we granted certiorari limited to the question of whether petitioner was denied his right under the Confrontation Clause to adequately cross-examine Green, 410 U. S. 925 (1973), the essential question turns on the correctness of the Alaska court's evaluation of the "adequacy" of the scope of cross-examination permitted. We disagree with that court's interpretation of the Confrontation Clause and we reverse.

(2)

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under *Pointer* v. *Texas,* 380 U. S. 400 (1965). Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Douglas* v. *Alabama,* 380 U. S. 415, 418 (1965). Professor Wigmore stated:

> "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of*

cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940). (Emphasis in original.)

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i. e.,* discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-

examination. *Greene* v. *McElroy,* 360 U. S. 474, 496 (1959).[4]

In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.[5]

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." *Douglas* v. *Alabama,* 380 U. S., at 419. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was

[4] In *Greene* we stated:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . ." 360 U. S., at 496.

[5] "[A] *partiality* of mind at some *former time* may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying." 3A J. Wigmore, Evidence § 940, p. 776 (Chadbourn rev. 1970). (Emphasis in original; footnotes omitted.)

admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. *Alford* v. *United States,* 282 U. S. 687 (1931),[6] as well as of Green's possible concern that he might be a suspect in the investigation.

We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart* v. *Janis,* 384 U. S. 1, 3." *Smith* v. *Illinois,* 390 U. S. 129, 131 (1968).

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[6] Although *Alford* involved a federal criminal trial and we reversed because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in *Alford* is not in doubt. In *Smith* v. *Illinois,* 390 U. S. 129, 132–133 (1968), we relied, in part, on *Alford* to reverse a state criminal conviction on confrontation grounds.

(3)

The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.

We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. *In re Gault,* 387 U. S. 1, 25 (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

In *Alford* v. *United States, supra,* we upheld the right

of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as "given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States." 282 U. S., at 693. In response to the argument that the witness had a right to be protected from exposure of his criminal record, the Court stated:

> "[N]o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." *Id.*, at 694.

As in *Alford*, we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. The judgment affirming petitioner's convictions of burglary and grand larceny is reversed and the case is

remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, concurring.

The Court holds that, in the circumstances of this case, the Sixth and Fourteenth Amendments conferred the right to cross-examine a particular prosecution witness about his delinquency adjudication for burglary and his status as a probationer. Such cross-examination was necessary in this case in order "to show the existence of possible bias and prejudice . . . ," *ante,* at 317. In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

As I see it, there is no constitutional principle at stake here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination, followed by a typical decision of a state appellate court refusing to disturb the judgment of the trial court and itself concluding that limiting cross-examination had done no substantial harm to the defense. Yet the Court insists on second-guessing the state courts and in effect inviting federal review of every ruling of a state trial judge who believes cross-examination has gone far enough. I would not undertake this task, if for no other reason than that I have little faith in our ability, in fact-bound cases and on a cold record, to improve on the judgment of trial judges and of the state appellate courts who agree with them. I would affirm the judgment.

NATIONAL LABOR RELATIONS BOARD *v.* MAGNAVOX COMPANY OF TENNESSEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1637. Argued January 14-15, 1974—
Decided February 27, 1974

At the time respondent company entered into a collective-bargaining agreement with a union, respondent had a blanket rule against distribution by employees of literature on company property. The collective agreement and subsequent contracts authorized the company to issue fair and nondiscriminatory rules for maintaining orderly conditions on plant property and also provided for bulletin boards for union notices. The union ultimately challenged the rule's validity, and upon denial of its request for a change, filed unfair-labor-practice charges against respondent; which the National Labor Relations Board (NLRB) upheld. The Court of Appeals denied enforcement of the NLRB's order, finding that the union had waived objection to the on-premises distribution ban. *Held:* Respondent's ban might interfere with the employees' rights under § 7 of the National Labor Relations Act "to form, join, or assist labor organizations," or to refrain from such activities, and such rights, unlike those in the economic area, cannot be waived by the employees' collective-bargaining representative. The bulletin-board provision did not afford an adequate alternative, since it did not give the union's adversaries equal access of communications with their fellow employees. Pp. 324-327.

474 F. 2d 1269, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed an opinion concurring in part and dissenting in part, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 327.

Peter G. Nash argued the cause for petitioner. With him on the brief were *Solicitor General Bork, John S. Irving, Patrick Hardin,* and *Norton J. Come.*

George K. McPherson, Jr., argued the cause and filed a brief for respondent. *Winn Newman* and *Ruth Weyand* filed a brief for the International Union of Electrical, Radio & Machine Workers, AFL–CIO, petitioner below, urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1954, the International Union of Electrical, Radio, and Machine Workers (IUE) became the collective-bargaining representative of respondent's employees. At that time respondent had a rule prohibiting employees from distributing literature on any of its property, including parking lots and other nonwork areas. The collective agreement authorized the company to issue rules for the "maintenance of orderly conditions on plant property," provided the rules were not "unfair" or "discriminatory." It also provided that bulletin boards would be available for the posting of union notices, subject to the company's right to reject "controversial" notices. All subsequent contracts contained similar provisions. Throughout the period since 1954 respondent has prohibited employees from distributing literature even in nonworking areas during nonworking time.

In due course, the IUE challenged the validity of the company's rule and requested that the rule be changed. The request was denied and the IUE filed charges against respondent for unfair labor practices in violation of § 8 (a)(1) of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. § 158 (a)(1). The Board held for the IUE, following its earlier decision in *Gale Products*, 142 N. L. R. B. 1246, where it had said:

> "Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share com-

> mon interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Id.*, at 1249.

The remedy in *Gale Products* ran in favor of employees whose distribution project was *to reject* a union representative. The Board in the present case, however, broadened the relief to embrace those who wanted *to support* a union representative, 195 N. L. R. B. 265. The Court of Appeals denied enforcement of the Board's order, because in its view the union had waived objection to the ban on on-premises distribution of literature and had the authority to do so. 474 F. 2d 1269. The case is here on petition for certiorari, which we granted because of the conflict between this decision of the Court of Appeals for the Sixth Circuit with that of the Eighth in *International Association of Machinists* v. *NLRB,* 415 F. 2d 113, and that of the Fifth in *NLRB* v. *Mid-States Metal Products,* 403 F. 2d 702.

Employees have the right recognized in § 7 of the Act "to form, join, or assist labor organizations" or "to refrain" from such activities. 29 U. S. C. § 157. We agree that a ban on the distribution of union literature or the solicitation of union support by employees at the plant during nonworking time may constitute an interference with § 7 rights. The Board had earlier held that solicitation outside working hours but on company property was protected by § 7 and that a rule prohibiting it was "discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *In re Peyton Packing Co.,* 49 N. L. R. B. 828, 843–844. We approved that ruling in *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793, 801–803. No contention is made here that considerations of production or dis-

cipline make respondent's rule necessary. The sole issue concerns the power of the collective-bargaining representative to waive those rights.

The union may, of course, reach an agreement as to wages and other employment benefits and waive the right to strike during the time of the agreement as the *quid pro quo* for the employer's acceptance of the grievance and arbitration procedure. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 455. Such agreements, however, rest on "the premise of fair representation" and presuppose that the selection of the bargaining representative "remains free." *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 280. In that case we held that the waiver of the "right to strike" did not embrace a waiver of the right to strike "against unlawful practices destructive of the foundation on which collective bargaining must rest." *Id.,* at 281. We dealt there with rights in the economic area. Yet, as the Fifth Circuit held in the *Mid-States* case, a different rule should obtain where the rights of the employees to exercise their choice of a bargaining representative is involved—whether to have no bargaining representative, or to retain the present one, or to obtain a new one. When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative. 403 F. 2d, at 705. The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights. For Congress declared in § 1 of the Act that it was the policy of the United States to protect "the exercise by

workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U. S. C. § 151.

It is argued that the use of the bulletin board is a fair substitute. But as the Fifth Circuit said in the *Mid-States* case the bulletin board may be an adequate medium for "preserving the status quo" and yet not give a union's adversaries "equal access to and communication with their fellow employees." 403 F. 2d, at 705.

Moreover, a limitation of the right of in-plant distribution of literature to employees opposing the union does not give a fair balance to § 7 rights, as the Board ruled in the present case. For employees supporting the union have as secure § 7 rights as those in opposition. The Board's position, as noted, has not always been consistent. But its present ruling is, we think, quite consistent with § 7 rights of employees. It is the Board's function to strike a balance among "conflicting legitimate interests" which will "effectuate national labor policy," including those who support *versus* those who oppose the union. *NLRB* v. *Truck Drivers Union*, 353 U. S. 87, 96. Moreover, as respects employers, the rights of solicitation of employees by employees concerning § 7 rights are not absolute. As we noted in *Republic Aviation Corp.* the Board may well conclude that considerations of production or discipline may make controls necessary. No such evidence existed here and the trial examiner so found. Accordingly, this is not the occasion to balance the availability of alternative channels of communication* against

*IUE, in a brief supporting the Board's position, states there are some 2,300 employees in the bargaining unit who live scattered over a two-state area covering more than 100 square miles. The plant is located in Greenville, Tennessee. Some workers live 30 miles distant in Johnson City, Tennessee, and others live in Morrison, North Carolina. It claims that handing out leaflets at the plant gate is impractical as cars enter or exit four abreast at fast speeds. We mention

a legitimate employer business justification for barring or limiting in-plant communications.

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

To the extent the Court holds that a union cannot contractually waive the right of disaffected employees to distribute in nonwork areas and during nonwork time literature advocating the displacement of the incumbent collective-bargaining representative, I am in complete agreement. This is the essence of the Board's decision in *Gale Products,* 142 N. L. R. B. 1246. But it seems to me wholly inconsistent with the letter and spirit of the National Labor Relations Act to relieve the union of its promise that its own self-serving literature will not be so distributed in the plant.

Although the union is deemed to represent all employees in the bargaining unit, both pro-union and anti-union, and may waive important § 7 rights in the course of collective bargaining, presumably in return for management concessions on other fronts, this authority cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests. The Board stated the point succinctly in its decision in *General Motors Corp.,* 158 N. L. R. B. 1723, 1727:

> "[T]he employees, by once selecting the union as their representative, do not forfeit their fundamental right to change their representative at appropriate times. When a union acts to abridge that right

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these statements not to resolve a controversy, but to indicate at least a part of the range of any inquiry into the need for in-plant solicitation if § 7 rights are to be protected.

> in the manner presented in this case, it is essentially benefiting the union *qua* union, to the detriment of the employees it represents."

Any such attempted waiver of the rights of others is so clearly in the union's self-interest of perpetuating its status as the bargaining agent, and at odds with the interests of the disaffected employees, that "the premise of fair representation" underlying contractual waivers of § 7 rights is wholly undermined. *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 280.

Judicial nullification of contractual concessions, however, is contrary to what the Court has recognized as "[o]ne of [the] fundamental policies" of the National Labor Relations Act—"freedom of contract." *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 108. "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45. Contractual waivers against a union's own interests are seldom if ever gratuitously granted in the give and take of the collective-bargaining process. In return, the union typically exacts some form of *quid pro quo* from the management negotiators. Since it is usually impossible to identify the consideration given in return for a particular union concession, the result of nullifying a union's agreement to waive the § 7 rights of its supporters will necessarily be to deprive management of the benefit of its bargain and to leave the union with a windfall. This sort of invalidation of bargained-for concessions does not promote stability in the collective-bargaining process and must certainly have a negative effect on labor-management relations. For this reason, the Board and the courts should

not relieve the parties of the promises they have made unless a contractual provision violates a specific section of the Act or a clear underlying policy of federal labor law.

In *Gale Products* the Board correctly determined that the union could not waive the distribution rights of employees who sought to distribute literature advocating the ouster of the incumbent union; for the clear policy of federal labor law forbids either the union or the employer to freeze out another union or to entrench the incumbent union by infringing the § 7 rights of dissident employees. I see no justification, however, for the Board's extension of the *Gale Products* rule to prevent the union's waiver of the distribution rights of its supporters in the bargaining unit.*

The considerations that distinguish the waiver of supporters' distribution rights from the waiver of opponents' distribution rights were cogently stated by the Fifth Circuit in *NLRB* v. *Mid-States Metal Products*, 403 F. 2d 702, 705:

> "Where union and employee interests are one it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees. But the rationale of allowing waiver by the union disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and em-

*The Board held, and I presume the Court agrees, that the union could waive any right that the employees might have to distribute union institutional literature. The only question in this case relates to the waivability of rights to distribute literature regarding the proposed selection, retention, or displacement of the collective-bargaining agent.

ployees may be wholly adverse. Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative.

"A waiver of the right to solicit and distribute literature does not hamper the union as it does the union's adversaries. The union can communicate through the bulletin board, union meetings and the force of status as bargaining representative, enjoying an advantage in preserving the status quo. Its adversaries will not have equal access to and communication with their fellow employees."

In nullifying the union's promise to waive the literature-distribution rights of its own supporters, the Board and today the Court are upsetting the delicate balance achieved in the give and take of negotiations and presenting the union with an undeserved windfall. This nullification, at the behest of the union that made the promise, can only contribute to future instability in collective bargaining between labor and management.

One can, of course, envision exceptional circumstances in which the union supporters' access to and communication with their fellow employees in the bargaining unit might be so restricted that it would be extremely difficult, in the absence of their § 7 distribution rights, for them to respond to the arguments made in literature distributed by their opponents. In such a case, the waiver of the supporters' rights might result in such a distortion of the labor political process as to prevent the balanced presentation of the issues to the em-

ployees that national labor policy seeks to promote. This concern was aptly expressed by the Board in its *General Motors* decision, 158 N. L. R. B., at 1726:

> "[W]e recogniz[e] the salutary purpose of refusing to disturb concessions yielded by either party through the processes of collective bargaining even where such a concession may infringe upon rights guaranteed employees under Section 7 of the Act. . . . [T]he validity of a particular concession or waiver must depend upon whether the interference with the employees' statutory rights is so great as to override any legitimate reasons for upholding the waiver, or would unduly hamper the employees in exercising their basic rights under the Act." (Internal quotations omitted.)

Thus, if in the absence of § 7 distribution rights the union supporters would be incapable of adequately presenting their position to the employees in a representation controversy, a strong argument could be made that the union's agreement was contrary to a basic policy of the National Labor Relations Act and that, despite the negative effect on the bargaining process, the union's promise could not be effective.

In this case, however, there is no suggestion of such exceptional circumstances that would incapacitate the union's supporters in any dispute regarding the union's continued status as the collective-bargaining agent. It is clear from the record that the union supporters have access to the company bulletin boards; that they may still solicit support, although not distribute literature, in nonwork areas during nonwork time; and that they may distribute literature, and have done so in the past, at the gates of the plant. Thus, it is evident that the union supporters would not be disabled by this provision of

the collective-bargaining agreement from maintaining their end of the political discourse that national labor policy seeks to foster.

I cannot agree to a general rule that allows the Board to nullify the union's promise, contained in a collective-bargaining agreement, that its supporters will not distribute literature in the plant. For this reason, I dissent from the judgment and the opinion of the Court insofar as they hold that the union could not validly waive the distribution rights of the employees who support it.

SPEIGHT, T/A HAREM BOOK STORE, ET AL. *v.* SLATON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 72–1557. Argued January 7–8, 1974—Decided February 27, 1974

Following oral argument in this Court of this appeal from an order of a three-judge District Court declining, on the basis of *Younger* v. *Harris*, 401 U. S. 37, to intervene in a state proceeding to enjoin operation of appellants' bookstore on the ground that it was violating a "public nuisance" statute by selling obscene materials, the statute was held unconstitutional by the Georgia Supreme Court as applied in a similar case, *Sanders* v. *State*, 231 Ga. 608, 203 S. E. 2d 153. Since appellants may secure a dismissal of the state proceeding against them on the basis of *Sanders*, thus precluding any irreparable injury, without which federal injunctive relief would be barred, the judgment below should be reconsidered in the light of the *Sanders* decision.

356 F. Supp. 1101, vacated and remanded.

Robert Eugene Smith argued the cause for appellants. With him on the brief was *D. Freeman Hutton*.

Thomas R. Moran argued the cause and filed a brief for appellees.

PER CURIAM.

This is an appeal from a decision of a three-judge District Court (356 F. Supp. 1101) declining to intervene in a pending state civil proceeding and holding that such intervention was barred by our decision in *Younger* v. *Harris*, 401 U. S. 37. The state proceeding, brought against appellants by the Solicitor General of Fulton County, Georgia, sought an injunction against the operation of appellant Speight's bookstore, and confiscation and destruction of all merchandise on the store's premises, on the grounds that the store was being used for the

"advertising, storage, sale, and exhibition for sale of materials obscene within the meaning of Section 26–2101 of the Criminal Code of Georgia." The basis for the State's action was § 26–2103 of the Code under which the use of any premises for the violation of § 26–2101 constitutes a "public nuisance," thereby triggering the application of state statutory provisions for the abatement of public nuisances, c. 72–2 of the Code of Georgia. The case is here on appeal. 28 U. S. C. §§ 1253, 2101 (b). We noted probable jurisdiction to decide whether under these circumstances federal intervention in the pending state proceedings was barred by our holding in *Younger* v. *Harris, supra.*

Since oral argument of this case the Georgia Supreme Court has struck down the application of § 26–2103 in another case involving similar facts. *Sanders* v. *State,* 231 Ga. 608, 203 S. E. 2d 153 (1974). In *Sanders* the State had brought an action to enjoin the operation of a bookstore on the ground that certain publications sold by the store were obscene under § 26–2101. The supreme court held that this application of § 26–2103 "represents an unconstitutional prior restraint when construed and applied to authorize the permanent closure of the book store as a public nuisance upon a finding that a single publication, obscene under the standards of Code Ann. § 26–2101 (b), was sold on its premises." *Id.,* at 611, 203 S. E. 2d, at 155. As we understand the Georgia court's decision, the operation of a bookstore could not be enjoined merely because some of its merchandise had been judicially determined to be obscene. The Georgia court cited both the Federal and Georgia Constitutions in its decision, although it was not explicit as to whether each provided, in its view, an independent ground for its holding.

It would appear that this Georgia Supreme Court decision would probably foreclose the state action

against which federal injunctive relief was sought by appellants in this case. In that event appellants could obtain full relief in the state court proceeding merely by moving to dismiss the state action, in accord with state procedural rules, in light of *Sanders* v. *State*. If that is the case, appellants could not now make any showing of irreparable injury by reason of the state court proceeding, and such a showing is of course required before the federal court could grant the equitable relief, apart from any special considerations involved in *Younger* v. *Harris, supra,* at 46.

We therefore vacate the judgment below and remand to the District Court for reconsideration in light of the decision of the Georgia Supreme Court in *Sanders* v. *State, supra.*

It is so ordered.

NATIONAL CABLE TELEVISION ASSN., INC. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-948. Argued December 3, 1973—Decided March 4, 1974

The Independent Offices Appropriation Act, 1952 (hereafter the Act), authorizes each federal agency to prescribe by regulation such fee for the agency's services as is determined to be fair and equitable, taking into consideration the direct and indirect "cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ." Pursuant to the Act, the Federal Communications Commission (FCC), in revising fees imposed upon community antenna television (CATV) systems, first estimated its direct and indirect costs for CATV regulations, and then, while retaining filing fees, added an annual fee for each CATV system at the rate of 30¢ per subscriber, concluding that this fee would approximate the "value to the recipient" used in the Act. The Court of Appeals, on a review obtained by petitioner, a CATV trade association, approved the FCC's action. *Held:*

1. The Act authorizes the imposition of a "fee," which connotes a "benefit" of "value to the recipient." The latter phrase is the proper measure of the authorized charge, not the "public policy or interest served" phraseology which, *if read literally*, would enable the agency to make assessments or tax levies whereby CATV's and other broadcasters would be paying not only for the benefits they received but, contrary to the Act's objectives, would also be paying for the protective services the FCC renders to the public. Pp. 340–343.

2. The FCC should reappraise the annual fee imposed upon the CATV's. It is not enough to figure the total cost (direct and indirect) to the FCC for operating a CATV supervision unit and then to contrive a formula reimbursing the FCC for that amount, since some of such costs certainly inured to the public's benefit and should not have been included in the fee imposed upon the CATV's. Pp. 343–344.

464 F. 2d 1313, reversed and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 352. BLACKMUN and POWELL, JJ., took no part in the decision of the case.

Stuart F. Feldstein argued the cause for petitioner. With him on the briefs was *Stephen A. Gold.*

Edward R. Korman argued the cause for the United States et al. With him on the brief were *Solicitor General Bork, Assistant Attorney General Kauper, John W. Pettit,* and *Joseph A. Marino.**

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Independent Offices Appropriation Act, 1952, Tit. 5, 65 Stat. 290, 31 U. S. C. § 483a, provides in relevant part: "It is the sense of the Congress that any work, service . . . benefit, . . . license, . . . or similar thing of value or utility performed, furnished, provided, granted . . . by any Federal agency . . . to or for any person (including . . . corporations . . .) . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ." [1] Petitioner is a trade association rep-

*Briefs of *amici curiae* urging reversal were filed by *Harold J. Cohen, F. Mark Garlinghouse,* and *Lloyd D. Young* for the American Telephone & Telegraph Co., and by *John B. Summers* for the National Association of Broadcasters.

[1] The Committee Report, H. R. Rep. No. 384, 82d Cong, 1st Sess., 2–3, makes the following comment on this measure:

"The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special

resenting community antenna television (CATV) systems which transmit TV programs by cable. The Federal Communications Commission is authorized to regulate these CATV outlets, as the Court held in *United States* v. *Southwestern Cable Co.*, 392 U. S. 157. The power to regulate, though not in the form of granting licenses,

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beneficiaries. Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations.

"It is understood that other committees of the Congress have interested themselves in this matter and that studies now are under way which may result in further legislation to require that adequate consideration be received for such services. However, such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable period. Accordingly, the Committee has inserted language in the bill (Title V, page 60) which would authorize and encourage the charging or increasing of fees to the extent permitted under present basic laws, but which would in no way conflict with studies now under way to effect changes in such basic laws.

"It is estimated that in 1952 the Government will receive more than $300,000,000 in fees from sources of the type here under consideration. It seems entirely possible that many of these fees could be raised, and that fees could be charged for other services of similar types in cases where no charge is now made, to the extent that the Government might realize upwards of $50,000,000 additional revenue.

"The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. It is not the Committee's intention in including this provision to disturb existing practices with respect to charges for postal services, sales of power, or the interest on loans by the Government."

extends to the promulgation of regulations requiring the compulsory origination of programs by CATV. *United States* v. *Midwest Video Corp.*, 406 U. S. 649. These CATV's, however, are not under the exclusive oversight of the Commission. Local governments and even some States provide permits or franchises to CATV's, including rights of way for the cables used. Some communities in return for their permits require the CATV to pay an annual percentage fee as a gross receipts tax.[2]

The Commission in 1964 established only nominal filing fees that produced revenues which approximated 25% of the Commission's annual appropriation. See 21 F. C. C. 2d 502, 503. See also *Aeronautical Radio, Inc.* v. *United States*, 335 F. 2d 304. The Bureau of the Budget urged higher fee schedules; and so did the committees of the Congress. See H. R. Rep. No. 91–316, pp. 7–8, and H. R. Conf. Rep. No. 91–649, p. 6, where it was stated:

> "The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency."

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[2] The most recent CATV rules adopted by the Commission (37 Fed. Reg. 3280) require a CATV to receive a certificate of compliance from the Commission, 47 CFR § 76.11 (b), and require it to obtain from the appropriate local government authority a certificate containing prescribed recitations and provisions. 47 CFR § 76.31. The new rules also limit the franchise fees that may be imposed on CATV's by the localities where they operate. 47 CFR § 76.31. Included in the new rules are restrictions on telephone companies on whose poles the CATV cable is usually strung. See 47 CFR §§ 63.54–63.57, 64.601–64.602. And see *General Telephone Co.* v. *United States*, 449 F. 2d 846, 851; Report of Jan. 14, 1974, Cabinet Committee on Cable Communications (known as the Whitehead Report).

The Commission, after notice and hearing, revised existing fees for licensees and for the first time imposed fees upon CATV's. It first estimated its direct and indirect costs for CATV regulation which were $1,145,400 or 4.6% of its total budget request for that year. Filing fees were retained; and there was added an annual fee for each cable television system at the rate of 30 cents for each subscriber. The Commission, finding that subscription rates clustered at about $5 a month, concluded that the 30-cent fee would typically amount to only about one-half of 1% of a CATV system's gross revenues from subscription. The fees would produce, it said, $1,145,000 annually, and it concluded that the 30-cent fee would approximate the "value to the recipient" used in the Act, 23 F. C. C. 2d 880; 28 F. C. C. 2d 139.

Petitioner obtained review of the decision in the Court of Appeals, which approved the Commission's action, 464 F. 2d 1313. The case is here on a petition for certiorari which we granted, 411 U. S. 981, because of an apparent conflict between the decision in this case and the decision in *New England Power Co.* v. *FPC*, 151 U. S. App. D. C. 371, 467 F. 2d 425, of the Court of Appeals for the District of Columbia Circuit.

Taxation is a legislative function, and Congress, which is the sole organ for levying taxes,[3] may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e. g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for

[3] By Art. I, § 8, cl. 1, of the Constitution it is the Congress that has the "Power to lay and collect Taxes."

a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U. S. C. § 483a narrowly as authorizing not a "tax" but a "fee." A "fee" connotes a "benefit" and the Act by its use of the standard "value to the recipient" carries that connotation. The addition of "public policy or interest served, and other pertinent facts," *if read literally,* carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House.

The lawmaker may, in light of the "public policy or interest served," make the assessment heavy if the lawmaker wants to discourage the activity;[4] or it may make the levy slight if a bounty is to be bestowed; or the lawmaker may make a substantial levy to keep entrepreneurs from exploiting a semipublic cause for their own personal aggrandizement. Such assessments are in the nature of "taxes" which under our constitutional regime are traditionally levied by Congress.

There is no doubt that the main function of the Commission is to safeguard the public interest in the broadcasting activities of members of the industry. If assessments are made by the Commission against members of the industry which are sufficient to recoup costs to the Commission for its oversight, the CATV's and other broadcasters would be paying not only for benefits they received but for the protective services rendered the public by the Commission. The fixing of such as-

[4] Mr. Chief Justice Marshall is credited with the statement that "the power to tax is the power to destroy," to which Mr. Justice Holmes replied, "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223 (dissenting opinion).

sessments, it is argued, is the levying of taxes. The Court, speaking through Mr. Chief Justice Hughes said in *Schechter Corp.* v. *United States,* 295 U. S. 495, 529:

> "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, § 1. And the Congress is authorized 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

Congress, of course, does delegate powers to agencies, setting standards to guide their determination. Thus, in *Hampton & Co.* v. *United States,* 276 U. S. 394, Congress enacted a flexible tariff law which authorized the imposition of customs duties on articles imported which equaled the difference between the cost of producing them in a foreign country and of selling them here and the cost of producing and selling like or similar articles in the United States. Provision was made for the investigation and determination of these differences by the Tariff Commission which reported to the President who increased or decreased the duty accordingly. The Court in sustaining that system said: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.,* at 409.

Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.

The phrase "value to the recipient" is, we believe,

the measure of the authorized fee. The words "public policy or interest served, and other pertinent facts" would not seem relevant to the present case, whatever may be their ultimate reach. The backbone of CATV is individual enterprise and ingenuity, not governmental largesse. The regulatory regime placed by Congress and the courts over CATV was not designed to make entrepreneurs rich but to serve the public interest by "mak-[ing] available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service." 48 Stat. 1064, as amended, 47 U. S. C. § 151.

While those who operate CATV's may receive special benefits, we cannot be sure that the Commission used the correct standard in setting the fee. It is not enough to figure the total cost (direct and indirect) to the Commission for operating a CATV unit of supervision and then to contrive a formula that reimburses the Commission for that amount. Certainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume. The philosophy of § 483a was stated by Congressman Sidney Yates of the House Committee on Appropriations. While he spoke of TV and radio broadcasters, what he said is germane to the CATV problem:

> "I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, . . . it should pay some of the costs of the hearings. It is perfectly proper that the franchised company make a profit, and there has been much profit mak-

ing. Such companies should assume a greater share of the costs, because regulation is necesary." 97 Cong. Rec. 4809.

That congressional aim can be achieved within the framework of "value to the recipient" as contrasted to the public policy or interest that is also served.

The result is that we reverse the Court of Appeals so that the case can be remanded to the Federal Communications Commission for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the decision of this case.

[For dissenting opinion of MR. JUSTICE MARSHALL, see *post*, p. 352.]

Syllabus

FEDERAL POWER COMMISSION *v.* NEW ENGLAND POWER CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1162. Argued December 3, 1973—Decided March 4, 1974

The Independent Offices Appropriation Act, 1952 (the Act), authorizes each federal agency to prescribe a fee, charge, or price for services provided by the agency "to or for any person (including groups . . .)," determined to be fair and equitable, consideration being taken of "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ." Pursuant to the Act, the Federal Power Commission imposed an annual assessment against all jurisdictional electric utilities in proportion to their wholesale sales and interchange of electricity, and against all natural gas companies with operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. On petitions for review, the Court of Appeals set aside these annual charges, holding that whole industries are not in the category of those who may be assessed under the Act, the thrust of which reaches only specific charges for specific services to specific individuals or companies. *Held:*

1. While the Act includes services rendered "to or for any person (including groups . . .)," since the Act is to be construed to cover only "fees" and not "taxes," *National Cable Television Assn.* v. *United States, ante,* p. 336, the "fee" presupposes an application for the agency's services, whether by a single company or group of companies or the receipt of a specific beneficial service. P. 349.

2. The Act is to be construed as authorizing a reasonable charge to "each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit," and as precluding a charge for services rendered "when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public." Pp. 349–351.

151 U. S. App. D. C. 371, 467 F. 2d 425, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the result, in which BRENNAN, J., joined, *post*, p. 352. BLACKMUN and POWELL, JJ., took no part in the decision of the case.

Keith A. Jones argued the cause for petitioner. On the brief were *Solicitor General Bork, Leo A. Forquer,* and *George W. McHenry, Jr.*

Thomas M. Debevoise and *Stanley M. Morley* argued the cause for respondents. With *Mr. Debevoise* on the brief for respondent New England Power Co. were *William J. Madden, Jr.*, and *Jerome C. Muys.* With *Mr. Morley* on the brief for respondent Independent Natural Gas Association of America were *Jerome J. McGrath* and *Francis H. Caskin. L. F. Cadenhead* and *Melvin Richter* were on the brief for respondent Tennessee Gas Pipeline Co., a division of Tenneco, Inc.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, companion to *National Cable Television Assn.* v. *United States, ante,* p. 336, raises another important problem of construction of the provisions of the Independent Offices Appropriation Act, 1952, Tit. 5, 65 Stat. 290, 31 U. S. C. § 483a. The Federal Power Commission established filing fees under the Natural Gas Act and under the Federal Power Act. These filing fees have not been challenged. What was challenged were annual assessments under both Acts, levied in an effort of the agency to recoup some of the remaining costs under the two Acts.

With respect to electric utilities, the Commission determines each year the costs of administering the Federal Power Act. The costs associated with the Commission's efforts to promote the co-ordination and

reliability of nonjurisdictional electric systems are not included. The Commission also deducts from administration costs the costs associated with services rendered to electric systems not subject to the Commission's jurisdiction and the amount received during the year from filing fees. The remaining balance is assessed against jurisdictional utilities [1] in proportion to their wholesale sales and interchange of electricity. In 1971 these companies had gross revenues of some $21 billion and net income of nearly $4 billion. The annual assessment challenged here involved 1973 and for all such electric companies was $5 million or 0.024% of gross revenue and 0.14% of net income.

As respects natural gas companies, the Commission determines each year the costs of administering the natural gas pipeline programs under the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 *et seq.* These costs, after deducting amounts received from filing fees, are assessed against all natural gas companies with annual operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. In addition, all natural gas companies required to file an annual report on their total gas supply (18 CFR § 260.7) are assessed one-tenth of a mill for each thousand cubic feet of new reserves of natural gas certificated each year to support the cost of the producer certificate program.

[1] Part I of the Federal Power Act covering licenses to hydroelectric companies, see 16 U. S. C. § 797 *et seq.*, is not involved in this litigation, only Parts II, 49 Stat. 847, 16 U. S. C. § 824 *et seq.*, and III, 49 Stat. 854, 16 U. S. C. § 825 *et seq.* Moreover, the "jurisdictional" aspect of a public utility's activities refers, *inter alia*, to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce as contained in § 201 of the Act, 49 Stat. 847, 16 U. S. C. § 824 *et seq.*, the provision that filled the gap created by *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. See *United States* v. *Public Utilities Comm'n*, 345 U. S. 295.

The Commission in its report, 45 F. P. C. 440 and 964, said as respects both electric utilities and natural gas companies that regulations have provided "the foundation for the sound financial condition which public utilities and natural gas companies have achieved." *Id.*, at 445. It mentioned the "industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system." *Id.*, at 445 n. 5. The Commission, while noting that its regulatory activities were beneficial to consumers, added that its actions

> "have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands." *Id.*, at 445.

As respects electric utilities it noted that its regime was "system wide and beneficial" to the companies. *Id.*, at 966. As respects natural gas pipelines it listed its activities that were beneficial to them:

> "the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines." *Id.*, at 967.

On petitions for review the Court of Appeals set aside that portion of the Commission's order establishing annual charges, 151 U. S. App. D. C. 371, 467 F. 2d 425. The case is here on a petition for certiorari, 411 U. S. 981.

The Act in question, 31 U. S. C. § 483a, authorizes the head of each federal agency to prescribe a "fee, charge, or price" for any "benefit, privilege, . . . license, permit, certificate, registration or similar thing of value . . . provided . . . by [the] Federal agency . . . for any person (including groups, . . . corporations . . .)" which he determines "to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ."

The Court of Appeals held that whole industries are not in the category of those who may be assessed, the thrust of the Act reaching only specific charges for specific services to specific individuals or companies. We agree with the Court of Appeals.

The report on the Act, H. R. Rep. No. 384, 82d Cong., 1st Sess., 2, states that "[t]he Committee is concerned that the Government is not receiving full return from many of the services which it renders to *special beneficiaries*" (emphasis added). It is true that the Act includes services rendered "to or for any person (including groups . . .)." But if we are to construe the Act to cover only "fees" and not "taxes"—as we held should be done in the *National Cable Television* case, *ante*, p. 336—the "fee" presupposes an application whether by a single company or by a group of companies. The Office of Management and Budget (then known as the Bureau of the Budget) issued a circular in 1959 [2] construing the Act. That circular stated that a reasonable charge "should be made to each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit." [3]

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[2] Budget Circular No. A–25, Sept. 23, 1959.

[3] The circular goes on to state that the services include agency action which "provides special benefits . . . above and beyond those

(Emphasis added.) The circular also states that no charge should be made for services rendered, "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." [4]

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which accrue to the public at large . . . . For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

"(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e. g., receiving a patent, crop insurance, or a license to carry on a specific business); or

"(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e. g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

"(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e. g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)."

[4] Since oral argument we have been advised by the Solicitor General that of all federal agencies "having industry-wide regulatory authority" there are two, other than the Federal Power Commission and the Federal Communications Commission, which impose "annual industry-wide fees analogous" to those in the instant case. The Solicitor General summarizes the actions of the other two federal agencies as follows:

"The fee schedule of the Atomic Energy Commission is set forth at 10 C. F. R. [§§] 170.21 and 170.31 and was last revised on October 29, 1973 (38 Fed. Reg. 30254–30255). Under that schedule, operators of nuclear power reactors are subject to a minimum annual fee of $20,000 and operators of other nuclear facilities are subject to annual fees ranging from $8,500 to $215,000. Holders of materials licenses are assessed annual fees of up to $27,000. The Commission estimates that approximately $7 million will be recovered from these annual fees in fiscal year 1974. The Commission's fee schedule, including annual fees, was first adopted in 1968.

"The Securities and Exchange Commission imposes an annual

We believe that is the proper construction of the Act. Though it greatly narrows the Act from the dimensions urged by the Commission, it keeps it within the boundaries of the "fee" system and away from the domain of "taxes" toward which the Commission's "economic climate" argument would lead. Some of the assessments made by the Commission under its formula would be on companies which had no proceedings before the Commission during the year in question. The "identifiable recipient" of a unit of service from which "he derives a special benefit," to quote the Office of Management and Budget, does not describe members of an industry which have neither asked for nor received the Commission's services during the year in question. A blanket ruling by the Commission, say on accounting practices, may not be the result of an application. But each member of the industry which is required to adopt the new accounting system is an "identifiable recipient" of the service and could be charged a fee, if the new system was indeed beneficial to the members of the industry. There may well be other variations of a like nature which would warrant the fixing of a "fee" for services rendered. But what was done here is not within the scope of the Act. Hence the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the decision of this case.

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fee of $100 on each of the approximately 1100 investment advisers registered with it under the Investment Advisors Act of 1940, 15 U. S. C. [§] 80b–1 et seq. See 17 C. F. R. [§] 275.203–3 (b). This fee was first adopted in 1972."

This statement covers only fees imposed under Tit. 5, 31 U. S. C. § 483a, not those authorized "under more specific grants of statutory authority."

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in the result in No. 72–1162 and dissenting in No. 72–948, *ante*, p. 336.

These cases present two distinct issues involving interpretation of the Independent Offices Appropriation Act, 1952: first, whether sufficient "work, service, . . . benefit, . . . or similar thing of value or utility" was conferred on the CATV operators or utility companies to warrant imposition of a fee under the statute; and, second, whether, if a fee was justifiably imposed, the amount of the fee was determined in accordance with a proper interpretation of the statutory standard that it be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." 31 U. S. C. § 483a.

The Court, however, fails to recognize that these issues require independent analysis. Instead, permeating the Court's opinions on both issues is an attempt to draw metaphysical distinctions between a "fee" and a "tax." I do not find this approach either helpful or appropriate; whatever the label, the questions presented in these cases involve simply whether the charges assessed by the Commissions were authorized by Congress. The Court's approach merely beclouds its analysis, producing results which seem to me inconsistent and affording guidance to the agencies in setting their fee policies which might be charitably described as uncertain.

This approach is allegedly based on the need to construe the statute narrowly to avoid constitutional difficulties. I do not believe that any serious question of the constitutionality of the Act would be presented if Congress had in fact authorized these charges. The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has

been virtually abandoned by the Court for all practical purposes,[1] at least in the absence of a delegation creating "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms," *United States* v. *Robel*, 389 U. S. 258, 272 (1967) (BRENNAN, J., concurring). This doctrine is surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U. S. 156 (1973)—if not more so. It is hardly surprising that, until today's de-

[1] "Lawyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests. Unrealistic verbiage in some of the older judicial opinions should not now be taken seriously. The effective law is in accord with a 1940 statement of the Supreme Court: 'Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.' [*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398 (1940).] Much of the judicial talk about requirement of standards is contrary to the action the Supreme Court takes when delegations are made without standards. The vaguest of standards are held adequate, and various delegations without standards have been upheld. . . .

"In only two cases in all American history have congressional delegations to public authorities been held invalid. Neither delegation was to a regularly constituted administrative agency which followed an established procedure designed to afford the customary safeguards to affected parties. The Panama case [*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935)] was influenced by exceptional executive disorganization and in absence of such a special factor would not be followed today. The Schechter case [*Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935)] involved excessive delegation of the kind that Congress is not likely again to make. . . .

"In absence of palpable abuse or true congressional abdication, the non-delegation doctrine to which the Supreme Court has in the past often paid lip service is without practical force." 1 K. Davis, Administrative Law Treatise § 2.01 (1958) (footnotes omitted).

cision, the Court had not relied upon *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935), almost since the day it was decided.[2]

I have no doubt—and I suspect that a majority of the Court would agree—that Congress could constitutionally authorize the Commissions to impose annual charges of the sort involved here. Surely the congressionally prescribed standards, permitting imposition of fees for work done or service or benefit provided if they are "fair and equitable" taking into account "cost to the Government, value to the recipient, [and] public policy," are sufficiently definite to withstand any conceivable delegation objection. See, *e. g., Yakus* v. *United States,* 321 U. S. 414, 423–427 (1944); *Lichter* v. *United States,* 334 U. S. 742, 783–786 (1948). I therefore see no reason to construe the statute in an artificially narrow way to avoid nonexistent constitutional difficulties.

Even on a neutral reading of the statute and its legislative history, however, I am convinced that Congress did not intend to authorize industrywide annual assessments like those at issue here. The movement in Congress to encourage Government agencies to establish fees to recover some of the costs of providing services to special beneficiaries began in 1950 with a study of the Senate Committee on Expenditures in the Executive Branch which culminated in a report to Congress on "Fees for Special Services." S. Rep. No. 2120, 81st Cong., 2d Sess. (1950). This report concluded that fees should be charged for agency services the benefits of which accrued wholly or primarily to special interests. *Id.,* at 3–4. In particular, the report pointed out that the FCC "renders a tremendous variety of services, a

[2] The last time that the Court relied upon *Schechter Poultry* was in *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (1936).

substantial number of which would lend themselves to equitable fees." *Id.*, at 4. The report listed the type of services for which assessment of fees would be appropriate: radio station construction permits, radio station operating licenses and renewals, authorization of assignment or transfer of licenses, radio operator licenses, and certificates of public convenience and necessity. *Id.*, at 11.[3]

On the other hand, the report was careful to point out the limited nature of its recommendations. It emphasized that it was not proposing that Government regulation in general be made self-sustaining by shifting the costs to those regulated:

> "There has been no quarrel with the philosophy governing the study that those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof. In the several staff reports and press releases which have been issued, occasion has been taken to reiterate that philosophy and to give reassurance that there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to special beneficiaries the expense now being borne for them by the taxpayers at large." *Id.*, at 3.

These themes were reiterated during the 1951 hearings which led directly to enactment of the Independent Offices Appropriation Act, 1952. Hearings on Independent Offices Appropriations for 1952 before the Subcommittee on Independent Offices of the House Committee on Appropriations, 82d Cong., 1st Sess. (1951). The questions of the committee members reflected their

[3] Similarly, as to the Federal Power Commission, the report suggested that fees could be charged for issuance of licenses and certificates of public convenience. *Id.*, at 12.

concern that the regulatory agencies were not recouping any part of the cost of services which benefited particular special interests. But it is apparent that the Committee had in mind imposition of fees for issuance of licenses, *id.*, at 281, 681, certificates of public convenience and necessity, *id.*, at 281, 524, and the like. And it was recognized that in the absence of this sort of special benefit, imposition of the cost of regulation on those regulated represented a different philosophical approach, as to which there had been in the past substantial resistance. *Id.*, at 730.

The actual language of the Appropriation Act is quite general, and is certainly capable of varying interpretations. But the intended content of the statute's authorization of fees to be charged for "any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility" can be gleaned from this legislative history. When the Committee Report expressed its concern that "the Government is not receiving full return from many of the services which it renders to special beneficiaries," H. R. Rep. No. 384, 82d Cong., 1st Sess., 2 (1951), and suggested that "fees could be charged for other services" "of the type here under consideration," *id.*, at 3, I think that it contemplated imposition of application fees, registration fees, and fees for grants of licenses, permits, or other similar authorizations. This interpretation is consistent with the statutory language, with its long enumeration of specific, readily identifiable, and discrete Commission actions for which fees can be charged. This interpretation is consistent, also, with the explanation of the statute on the floor of the House offered by Representative Yates, in which he cited the award of franchises, licenses, certificates of public convenience and necessity, and construction permits as

examples of benefits for which fees could appropriately be charged by the FCC. 97 Cong. Rec. 4809 (1951).

I see nothing in the legislative history which suggests any broader interpretation of the concept of "benefit" under the Act. On the contrary, since the broader view that the full cost of regulation should be assessed those subject to the agency's jurisdiction in the absence of a "special benefit" would have represented a controversial policy choice, I think that the very lack of debate over this provision of the Act and the ease with which it passed compel the more limited interpretation. The Committee Report itself noted that more "basic" changes in agency fee practice would have to await further study by congressional committees and additional legislation. H. R. Rep. No. 384, 82d Cong., 1st Sess., 2–3 (1951).

I therefore do not believe that the creation of an "economic climate" which fosters the growth of a regulated industry is a sufficiently specific, discrete benefit within the meaning of the Appropriation Act to justify imposition of a fee. Nor do I think that this benefit is conferred upon a sufficiently identifiable recipient to be the basis for assessment of a fee. Accordingly, I agree with the Court's construction of the Act, *ante,* at 349–350, and concur in the result in this case.

I cannot agree, however, with the result in No. 72–948, *National Cable Television Assn.* v. *United States, ante,* p. 336. In view of the Court's conclusion in No. 72–1162, I am mystified as to how the Court can reach its apparent, though completely unexplained, holding in No. 72–948 that operators of CATV systems may receive "special benefits" sufficient to sustain imposition of an annual fee under the Appropriation Act. *Ante,* at 343. In 1970, when the fees at issue here were established, FCC regulation of CATV was quite limited. CATV operators did not receive licenses or any similar authorization from the Commission.

Rather, their franchises were generally awarded by state authorities, to whom the CATV operators pay franchise fees. Although FCC regulations prohibited carriage of distant signals into larger television markets unless Commission authorization was obtained, 47 CFR § 74.1107 (1968),[4] carriage of local signals as well as distant signals into smaller markets was permitted, unless objections were raised, without the need for approval by the Commission. 47 CFR §§ 74.1105 (a), (c) (1968). Many of the CATV operators against whom these annual charges were assessed had no contact at all with the Commission during 1970, and some had never had any dealings with the Commission. The only other FCC regulations of CATV in 1970 pointed to by the Solicitor General are regulations which prohibit telephone companies and television broadcasters from entering the CATV field.[5]

In my view, the mere existence of such regulation cannot justify the annual fees imposed in this case. While these regulations may have been of some benefit to the CATV industry in a very broad sense, I regard the FCC's argument on this point as identical to the FPC's

[4] It would seem clear that fees could appropriately be imposed under the Appropriation Act in connection with application for or issuance of such Commission authorization. However, no such fees are at issue in this case.

[5] Extensive new regulations of CATV were promulgated in 1972. 37 Fed. Reg. 3280 (Feb. 12, 1972). These regulations prescribe in considerable detail the provisions of franchises granted by local authorities to CATV operators, and also limit the franchise fees which may be charged by the localities in which CATV stations operate. Most important for present purposes, the new regulations also provide that a CATV operator must obtain an FCC certificate of compliance before commencing operations; existing cable systems must obtain a certificate of compliance by March 31, 1977. 47 CFR § 76.11 (b) (1973). While these new regulations will undoubtedly affect the question of the permissibility of fees imposed for future years, they cannot retroactively validate fees imposed for 1970.

"economic climate" argument rejected by the Court in No. 72–1162. I can see no specific benefit provided or service rendered by the Commission on the order of the grant of a license or certificate, processing of an application, or even provision of a new and useful accounting system. Nor do I believe that the benefits of FCC regulation have been conferred on any identifiable recipient; I would think this a classic case where " 'the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public.' " *Ante,* at 350.

I would therefore hold that the annual fees imposed in both these cases were not authorized by the statute. But since the Court apparently holds otherwise, and goes on to discuss the standards to be applied by the FCC in setting fees under the statute, I think it appropriate to express my views on this issue. I cannot agree with the Court that the only factor which the Commission may consider in determining the amount of the fees is the "value to the recipient." The statute provides that the fee must be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." This is a perfectly clear and intelligible standard, and I see no reason why, assuming a proper occasion for imposition of a fee, the Commission is not entitled to weigh each of the statutory considerations. It may well be true that the Commission here gave undue emphasis to one of the statutory factors, "cost to the Government." But the Court's response, to require that undue, seemingly exclusive reliance be placed on the standard of "value to the recipient" is, in my opinion, equally erroneous. It is also quite unrealistic and unworkable: How is the Commission to determine whether to set the fee at 1%, 5%, or 50% of the "value to the

recipient" unless it is also free to consider such other factors as "cost to the Government" and "public policy"?

I would leave the Commission free to consider all the statutory standards in setting its fees. Certainly the Commission should be free to consider "cost to the Government," [6] as well as the statutory mandate that the Commission "be self-sustaining to the full extent possible." It could not be clearer, from the language of the statute and from its genesis, that Congress intended these factors to be considered by the Commissions in setting their fee schedules. If the Court seriously believes that this somehow presents a substantial constitutional problem, then the constitutional issue should be squarely faced and resolved; it should not be permitted to justify the Court's rewriting of the statute contrary to congressional intent.

I would affirm the judgment of the Court of Appeals in No. 72–1162 and reverse the judgment in No. 72–948.

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[6] In my view, "cost to the Government" comprehends the cost of FCC regulation of the industry as well as the cost of processing a specific application. While the existence of such regulation is not itself sufficient under the present statute to sustain imposition of a fee, it will often be beneficial to the industry—as the Government's "economic climate" argument suggests—and will play a role in enhancing the "value to the recipient" of the license or other authorization. It is therefore neither unreasonable nor inconsistent with the statutory intent that the contribution of this regulation be considered.

Syllabus

JOHNSON, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. *v.* ROBISON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 72–1297. Argued December 11, 1973—Decided March 4, 1974

Appellee, who had been exempted from military service as a Class I–O conscientious objector but who performed required alternative civilian service, after being denied educational benefits under the Veterans' Readjustment Benefits Act of 1966, brought this class action for a declaratory judgment that the provisions of the Act making him and his class ineligible for such benefits violated the First Amendment's guarantee of religious freedom and the Fifth Amendment's guarantee of equal protection of the laws. After denying appellants' motion to dismiss for lack of jurisdiction because of 38 U. S. C. § 211 (a), which prohibits judicial review of decisions of the Administrator of Veterans' Affairs on any question of law or fact under laws administered by the Veterans' Administration providing for veterans' benefits, the District Court rejected appellee's First Amendment claim but sustained the Fifth Amendment claim. *Held:*

1. Section 211 (a) does not extend to actions challenging the constitutionality of veterans' benefits legislation but is aimed at prohibiting review only of those decisions of law or fact arising in the *administration* of a *statute* providing for veterans' benefits, and hence is inapplicable to this action, neither the text of the statute nor its legislative history showing a contrary intent. Pp. 366–374.

2. The challenged sections of the Act do not create an arbitrary classification in violation of appellee's right to equal protection of the laws. Pp. 374–383.

(a) The quantitative and qualitative distinctions between the disruption caused by military service and that caused by alternative civilian service—military service involving a six-year commitment and far greater loss of personal freedom, and alternative civilian service involving only a two-year obligation and no requirement to leave civilian life—form a rational basis for Congress' classification limiting educational benefits to military service vet-

erans as a means of helping them to readjust to civilian life. Pp. 378–382.

(b) The statutory classification also bears a rational relationship to the Act's objective of making military service more attractive. P. 382.

3. The Act does not violate appellee's right of free exercise of religion. *Gillette* v. *United States*, 401 U. S. 437. Pp. 383–386.

(a) The withholding of educational benefits to appellee and his class involves only an incidental burden, if any burden at all, upon their free exercise of religion. P. 385.

(b) Appellee and his class were not included as beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to include them would not rationally promote the Act's purposes. P. 385.

(c) The Government's substantial interest in raising and supporting armies, Art. I, § 8, is of "a kind and weight" clearly sufficient to sustain the challenged legislation. Pp. 385–386.

352 F. Supp. 848, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 386.

Gerald P. Norton argued the cause for appellants. On the brief were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Harriet S. Shapiro, Morton Hollander,* and *William Kanter.*

Michael David Rosenberg argued the cause for appellee. With him on the brief were *Charles R. Nesson* and *Matthew Feinberg.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A draftee accorded Class I–O conscientious objector status and completing performance of required alternative

**Donald S. Burris* filed a brief for the National Interreligious Service Board for Conscientious Objectors as *amicus curiae* urging affirmance.

civilian service [1] does not qualify under 38 U. S. C. § 1652 (a)(1) as a "veteran who . . . served on active duty" (defined in 38 U. S. C. § 101 (21) as "full-time duty in the Armed Forces"), and is therefore not an "eligible veteran" entitled under 38 U. S. C. § 1661 (a) to veterans' educational benefits provided by the Veterans' Readjustment Benefits Act of 1966.[2] Appellants, the Veterans'

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[1] Title 50 U. S. C. App. § 456 (j) exempts from military service persons "who, by reason of religious training and belief," are opposed to participation in "war in any form."

Title 32 CFR § 1622.14 (1971) directed local Selective Service Boards that

"[i]n Class I–O shall be placed every registrant who would have been classified in Class I–A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Further, § 456 (j) and 32 CFR §§ 1660.1–.12 (1972) authorized local Selective Service Boards to order I–O conscientious objectors to perform alternative civilian service contributing to the maintenance of the national health, safety, or interest.

[2] Title 38 U. S. C. § 101 provides, in pertinent part:

"(21) The term 'active duty' means—

"(A) full-time duty in the Armed Forces, other than active duty for training."

Title 38 U. S. C. § 1652 (a)(1) provides:

"The term 'eligible veteran' means any veteran who (A) served on active duty for a period of more than 180 days any part of which occurred after January 31, 1955, and who was discharged or released therefrom under conditions other than dishonorable or (B) was discharged or released from active duty after such date for a service-connected disability."

Title 38 U. S. C. § 1661 (a) provides:

"Except as provided in subsection (c) and in the second sentence of this subsection, each eligible veteran shall be entitled to educational assistance under this chapter for a period of one and one-half months (or the equivalent thereof in part-time educational assistance) for each month or fraction thereof of his service on active

Administration and the Administrator of Veterans' Affairs, for that reason, denied the application for educational assistance of appellee Robison, a conscientious objector who filed his application after he satisfactorily completed two years of alternative civilian service at the Peter Bent Brigham Hospital, Boston. Robison thereafter commenced this class action [3] in the United States District Court for the District of Massachusetts, seeking a declaratory judgment that 38 U. S. C. §§ 101 (21), 1652 (a)(1), and 1661 (a), read together, violated the First Amendment's guarantee of religious freedom and the Fifth Amendment's guarantee of equal protection of the laws.[4] Appellants moved to dismiss the action on the

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duty after January 31, 1955. If an eligible veteran has served a period of 18 months or more on active duty after January 31, 1955, and has been released from such service under conditions that would satisfy his active duty obligations, he shall be entitled to educational assistance under this chapter for a period of 36 months (or the equivalent thereof in part-time educational assistance)."

The amount of money provided by the Act varies with the type of educational program pursued and the number of dependents a veteran has. For example, a veteran enrolled in a full-time college or graduate degree program with two dependents receives $298 per month. 38 U. S. C. § 1682 (a), as amended by the Vietnam Era Veterans' Readjustment Assistance Act of 1972, § 102, 86 Stat. 1075.

[3] In defining the class the District Court stated: "The court also rules that certification of a class, pursuant to Fed. Rule Civ. Proc. 23, is warranted, the class to include all those selective service registrants who have completed 180 days of 'alternate service' pursuant to 50 U. S. C. App. § 456 (j), and who have either (1) satisfactorily completed two years of such service or (2) been released therefrom for medical or other reason after 180 days of such service." 352 F. Supp. 848, 851.

[4] Although "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); see *Frontiero* v. *Richardson*, 411 U. S. 677, 680 n. 5 (1973); *Shapiro* v. *Thompson*, 394 U. S. 618, 641–642 (1969); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). Thus, if a classification would be

ground, among others, that the District Court lacked jurisdiction because of 38 U. S. C. § 211 (a) which prohibits judicial review of decisions of the Administrator.[5] The District Court denied the motion, and, on the merits, rejected appellee's First Amendment claim, but sustained the equal protection claim and entered a judgment declaring "that 38 U. S. C. §§ 1652 (a)(1) and 1661 (a) defining 'eligible veteran' and providing for entitlement to educational assistance are unconstitutional and that 38 U. S. C. § 101 (21) defining 'active duty' is unconstitutional with respect to chapter 34 of Title 38, United States Code, 38 U. S. C. §§ 1651–1697, conferring Veterans' Educational Assistance, for the reason that said sections deny plaintiff and members of his class due process of law in violation of the Fifth Amendment to the Constitution of the United States . . . ." 352 F. Supp. 848, 862 (1973).[6] We post-

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invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. See *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971).

[5] Title 38 U. S. C. § 211 (a) provides:

"(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

[6] A second paragraph of the judgment declares that appellee and members of his class, who have satisfactorily completed two years of alternative civilian service, or who, after completing 180 days of such service, have been released therefrom, are to be considered "eligible" within § 1652 (a)(1) to receive benefits to the same degree and extent as veterans of "active duty"; and alternative service shall be considered "active duty" within § 101 (21) as applied only to c. 34 of Title 38. 352 F. Supp., at 862. In view of our result, this paragraph of the judgment is also reversed.

poned consideration of the question of jurisdiction in light of § 211 (a) to the hearing on the merits, and set the case for oral argument with No. 72–700, *Hernandez* v. *Veterans' Administration, post,* p. 391. 411 U. S. 981 (1973).[7] We hold, in agreement with the District Court, that § 211 (a) is inapplicable to this action and therefore that appellants' motion to dismiss for lack of jurisdiction of the subject matter was properly denied. On the merits, we agree that appellee's First Amendment claim is without merit but disagree that §§ 1652 (a)(1), 1661 (a), and 101 (21) violate the Fifth Amendment and therefore reverse the judgment of the District Court.

I

We consider first appellants' contention that § 211 (a) bars federal courts from deciding the constitutionality of veterans' benefits legislation. Such a construction would, of course, raise serious questions concerning the constitutionality of § 211 (a),[8] and in such case "it is a

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[7] The District Court's jurisdiction was invoked by appellee pursuant to 28 U. S. C. §§ 1331, 1337, 1343, and 1361. Appellants appealed pursuant to the provision of 28 U. S. C. § 1252 which provides:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

The appellants do not appeal the District Court's adverse ruling upon two alternative grounds for dismissal: that the complaint failed to state a claim upon which relief could be granted, and that the plaintiff failed to exhaust available administrative remedies.

[8] Compare *Ex parte McCardle,* 7 Wall. 506 (1869); *Sheldon* v. *Sill,* 8 How. 441 (1850), with *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (1816); *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 84 (1936) (Brandeis, J., concurring). See Hart, The Power of Congress

cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided." *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971).

Plainly, no explicit provision of § 211 (a) bars judicial consideration of appellee's constitutional claims. That section provides that "the *decisions* of the Administrator on any question of law or fact *under* any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision . . . ." (Emphasis added.) The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the *Administrator*, but rather to a decision of *Congress* to create a statutory class entitled to benefits that does not include I–O conscientious objectors who performed alternative civilian service. Thus, as the District Court stated: "The questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged." 352 F. Supp., at 853.

This construction is also supported by the administrative practice of the Veterans' Administration. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the

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to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953).

statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). The Board of Veterans' Appeals expressly disclaimed authority to decide constitutional questions in *Appeal of Sly*, C–27 593 725 (May 10, 1972). There the Board, denying a claim for educational assistance by a I–O conscientious objector, held that "[t]his decision does not reach the issue of the constitutionality of the pertinent laws as this matter is not within the jurisdiction of this Board." *Sly* thus accepts and follows the principle that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. See *Public Utilities Comm'n* v. *United States*, 355 U. S. 534, 539 (1958); *Engineers Public Service Co.* v. *SEC*, 78 U. S. App. D. C. 199, 215–216, 138 F. 2d 936, 952–953 (1943), dismissed as moot, 332 U. S. 788." *Oestereich* v. *Selective Service Board*, 393 U. S. 233, 242 (1968) (Harlan, J., concurring in result); see Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 271–275 (1955).

Nor does the legislative history accompanying the 1970 amendment of § 211 (a) demonstrate a congressional intention to bar judicial review even of constitutional questions. No-review clauses similar to § 211 (a) have been a part of veterans' benefits legislation since 1933.[9] While

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[9] Section 5 of the Economy Act of 1933, 48 Stat. 9, which created the present Veterans' Administration, provided:

"All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title . . . shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

In 1940 the no-review statute was amended, § 11, 54 Stat. 1197, to expand its application:

"Notwithstanding any other provisions of law . . . the decisions of the Administrator of Veterans' Affairs on any question of law or

the legislative history accompanying these precursor no-review clauses is almost nonexistent,[10] the Administrator, in a letter written in 1952 in connection with a revision

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fact concerning a claim for benefits or payments under this or any other Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions."

When veterans' benefits legislation was finally consolidated in the Veterans' Benefits Act of 1957, § 211, 71 Stat. 92, the no-review clause was left substantially unaltered:

"[D]ecisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

[10] The only discussion of § 5 of the Economy Act of 1933 was in the Senate, where it was stated that § 5 "gives to the Veterans' Administration only such authority as the Administration now has." 77 Cong. Rec. 254 (1933).

The 1940 Act received little more discussion. However, Senator George remarked of the no-review clause:

"[T]he bill only confirms what has been the accepted belief and conviction, that with respect to any pension, [or] gratuity, . . . there is no right of action in the courts . . . . It is not so much a limitation as a restatement of what is believed to be the law upon the question." 86 Cong. Rec. 13383 (1940).

The House debate indicates that the no-review clause

"is desirable for the purpose of uniformity and to make clear what is believed to be the intention of Congress that the various laws shall be uniformly administered in accordance with the liberal policies governing the Veterans' Administration." *Id.*, at 13491.

The legislative history attending the 1957 amendment to the no-review clause is similarly uninstructive, indicating only that the change was one of consolidation. See H. R. Rep. No. 279, 85th Cong., 1st Sess., 1 (1957); S. Rep. No. 332, 85th Cong., 1st Sess., 1 (1957). See Davis, Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government, 39 Ind. L. J. 181, 188–189 (1964); Comment, Judicial Review and the Governmental Recovery of Veterans' Benefits, 118 U. Pa. L. Rev. 288, 291–292 (1969).

of the clause under consideration by the Subcommittee of the House Committee on Veterans' Affairs, comprehensively explained the policies necessitating the no-review clause and identified two primary purposes: (1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation,[11] and (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.[12]

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[11] "There is for consideration the added expense to the Government not only with respect to the added burden upon the courts, but the administrative expense of defending the suits."

Hearing on H. R. 360, 478, 2442 and 6777 before a Subcommittee of the House Committee on Veterans' Affairs, 82d Cong., 2d Sess., 1963 (1952).

[12] "In the adjudication of compensation and pension claims a wide variety of medical, legal, and other technical questions constantly arise which require the study of expert examiners of considerable training and experience, and which are not readily susceptible of judicial standardization. Among other questions to be determined in the adjudication of such claims are those involving length and character of service, origin of disabilities, complex rating schedules, a multiplicity of medical and physical phenomena for consideration intercurrently with such schedules, and the application of established norms to the peculiarities of the particular case. These matters have not been considered by the Congress or the courts appropriate for judicial determination but have been regarded as apt subjects for the purely administrative procedure. Due to the nature and complexity of the determinations to be made, it is inevitable that the decisions of the courts in such matters would lack uniformity. It cannot be expected that the decisions of the many courts would be based on the uniform application of principles as is now done by the Veterans' Administration through its system of coordination by the central office and by its centralized Board of Veterans' Appeals."

Hearing, *supra*, n. 11, at 1962–1963.

The legislative history of the 1970 amendment indicates nothing more than a congressional intent to preserve these two primary purposes. Before amendment, the no-review clause made final "the decisions of the Administrator on any question of law or fact *concerning a claim for benefits or payments* under [certain] law[s] administered by the Veterans' Administration" (emphasis added), 38 U. S. C. § 211 (a) (1964 ed.), 71 Stat. 92. In a series of decisions, *e. g., Wellman* v. *Whittier,* 104 U. S. App. D. C. 6, 259 F. 2d 163 (1958); *Thompson* v. *Gleason,* 115 U. S. App. D. C. 201, 317 F. 2d 901 (1962); and *Tracy* v. *Gleason,* 126 U. S. App. D. C. 415, 379 F. 2d 469 (1967), the Court of Appeals for the District of Columbia Circuit interpreted the term "claim" as a limitation upon the reach of § 211 (a), and as a consequence held that judicial review of actions by the Administrator *subsequent* to an original grant of benefits was not barred.

Congress perceived this judicial interpretation as a threat to the dual purposes of the no-review clause. First, the interpretation would lead to an inevitable increase in litigation with consequent burdens upon the courts and the Veterans' Administration. In its House Report, the Committee on Veterans' Affairs stated that "[s]ince the decision in the *Tracy* case—and as the result of that decision and the *Wellman* and *Thompson* decisions—suits in constantly increasing numbers have been filed in the U. S. District Court for the District of Columbia by plaintiffs seeking a resumption of terminated benefits." H. R. Rep. No. 91–1166, p. 10 (1970). This same concern over the rising number of court cases was expressed by the Administrator in a letter to the Committee:

> "The *Wellman, Thompson,* and *Tracy* decisions have not been followed in any of the other 10 Federal judicial circuits throughout the country.

> Nevertheless, soon after the *Tracy* decision, suits in the nature of mandamus or for declaratory judgment commenced to be filed in the U. S. District Court for the District of Columbia in constantly increasing numbers by plaintiffs seeking resumption of terminated benefits. As of March 8, 1970, 353 suits of this type had been filed in the District of Columbia circuit.
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> . . . . .
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> "The scope of the *Tracy* decision and the decisions upon which it is based is so broad that it could well afford a basis for judicial review of millions of decisions terminating or reducing many types of benefits provided under laws administered by the Veterans' Administration. Such review might even extend to the decisions of predecessor agencies made many years ago." *Id.*, at 21, 24.

Second, Congress was concerned that the judicial interpretation of § 211 (a) would involve the courts in day-to-day determination and interpretation of Veterans' Administration policy. The House Report states that the cases already filed in the courts in response to *Wellman, Thompson,* and *Tracy*

> "involve a large variety of matters—a 1930's termination of a widow's pension payments under a statute then extant, because of her open and notorious adulterous cohabitation; invalid marriage to a veteran; severance of a veteran's service connection for disability compensation; reduction of such compensation because of lessened disability . . . [and] suits . . . brought by [Filipino] widows of World War II servicemen seeking restoration of death compensation or pension benefits terminated after the Administrator raised a presumption of their remarriage on the basis of evidence gathered through

> field examination. Notwithstanding the 1962 endorsement by the Congress of the Veterans' Administrations [*sic*] administrative presumption of remarriage rule, most of [the suits brought by Filipino widows] have resulted in judgments adverse to the Government." *Id.*, at 10.

The Administrator voiced similar concerns, stating that "it seems obvious that suits similar to the several hundred already filed can—and undoubtedly will—subject nearly every aspect of our benefit determinations to judicial review, including rating decisions, related Veterans' Administration regulations, Administrator's decisions, and various adjudication procedures." Letter to the Committee on Veterans' Affairs 23–24.

Thus, the 1970 amendment was enacted to overrule the interpretation of the Court of Appeals for the District of Columbia Circuit, and thereby restore vitality to the two primary purposes to be served by the no-review clause. Nothing whatever in the legislative history of the 1970 amendment, or predecessor no-review clauses, suggests any congressional intent to preclude judicial cognizance of constitutional challenges to veterans' benefits legislation. Such challenges obviously do not contravene the purposes of the no-review clause, for they cannot be expected to burden the courts by their volume, nor do they involve technical considerations of Veterans' Administration policy. We therefore conclude, in agreement with the District Court, that a construction of § 211 (a) that does not extend the prohibitions of that section to actions challenging the constitutionality of laws providing benefits for veterans is not only "fairly possible" but is the most reasonable construction, for neither the text nor the scant legislative history of § 211 (a) provides the "clear and convincing" evidence of congressional intent required by this Court before a

statute will be construed to restrict access to judicial review. See *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 141 (1967).

II

Turning to the merits, the District Court held that, by not including appellee and his class, the challenged sections of the Act create an arbitrary classification in violation of appellee's right to equal protection of the laws. In determining whether, in limiting the class of draftees entitled to benefits to those who serve their country on active duty in the Armed Forces, Congress denied equal protection of the laws to Selective Service registrants who perform alternative civilian service as conscientious objectors,[13] our analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws "does not deny . . . the power to treat different classes of persons in different ways[;] . . . [it denies] the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly

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[13] In an effort to enhance the attractiveness of service in the Public Health Service and the National Oceanic and Atmospheric Administration, the Act also makes educational benefits available to commissioned officers in those services. 38 U. S. C. §§ 101 (21), 1652 (a)(3). Officers in those services are usually specialists in various fields of science and possess a high degree of technical expertise. See 42 CFR §§ 21.11, 21.25–.31, 21.41–.42 (1972); 33 U. S. C. §§ 883a–883b. Appellee does not argue that he and his class, and the officers of those services, are so similarly circumstanced that the different treatment the Act accords the two groups constitutes a denial of equal protection.

circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920)." *Reed* v. *Reed*, 404 U. S. 71, 75–76 (1971).[14]

[14] Appellee argues that the statutory classification should be subject to strict scrutiny and upheld only if a compelling governmental justification is demonstrated because (1) the challenged classification interferes with the fundamental constitutional right to the free exercise of religion, and (2) I–O conscientious objectors are a suspect class deserving special judicial protection. We find no merit in either contention. Unquestionably, the free exercise of religion is a fundamental constitutional right. However, since we hold in Part III, *infra*, that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test. With respect to appellee's second contention, we find the traditional indicia of suspectedness lacking in this case. The class does not possess an "immutable characteristic determined solely by the accident of birth," *Frontiero* v. *Richardson*, 411 U. S., at 686, nor is the class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 28 (1973). As the District Court observed:

"Congress, which is under no obligation to carve out the conscientious objector exemption for military training, see United States v. Macintosh, 1931, 283 U. S. 605, 624; Gillette v. United States, 1971, 401 U. S. 437, 457, 461 n. 23, has nevertheless done so. Perhaps this exemption from military training reflects a congressional judgment that conscientious objectors simply could not be trained for duty; but it is equally plausible that the exemption reflects a congressional determination to respect individual conscience. See United States v. Macintosh, *supra*, 283 U. S. at 633 ([Hughes,] C. J., dissenting). Given the solicitous regard that Congress has manifested for conscientious objectors, it would seem presumptuous of a court to subject the educational benefits legislation to strict scrutiny on the basis of the 'suspect classification' theory, whose underlying rationale is that, where legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down." 352 F. Supp., at 855.

Unlike many state and federal statutes that come before us, Congress in this statute has responsibly revealed its express legislative objectives in § 1651 of the Act and no other objective is claimed:

> "The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country."

Legislation to further these objectives is plainly within Congress' Art. I, § 8, power "to raise and support Armies." Our task is therefore narrowed to the determination of whether there is some ground of difference having a fair and substantial relation to at least one of the stated purposes justifying the different treatment accorded veterans who served on active duty in the Armed Forces, and conscientious objectors who performed alternative civilian service.

The District Court reasoned that objectives (2), (3), and (4) of § 1651 are basically variations on a single theme reflecting a congressional purpose to "eliminate the educational gaps between persons who served their country and those who did not." 352 F. Supp., at 858. Therefore,

> "[t]he exclusion from eligibility of [appellee] and his class would be justified if they do not suffer the same disruption in educational careers as do military veterans, and thus are not similarly situated with respect to the statute's purpose. We believe . . . that the disruption is equal as between the two groups. Like military veterans, alternate servicemen have been exposed to the uncertainties caused by the draft law. They too were burdened at one time by an unsatisfied military obligation that adversely affected their employment potential; were forced, because of the draft law, to [forgo] immediately entering into vocational training or higher education; and were deprived, during the time they performed alternate service, of the opportunity to obtain educational objectives or pursue more rewarding civilian goals." *Id.*, at 858–859.

The error in this rationale is that it states too broadly the congressional objective reflected in (2), (3), and (4) of § 1651. The wording of those sections, in conjunction with the attendant legislative history, makes clear that Congress' purpose in enacting the Veterans' Readjustment Benefits Act of 1966 was not primarily to "eliminate the educational gaps between persons who served their country and those who did not," but rather to compensate for the disruption that military service causes to civilian lives. In other words, the aim of the Act was to assist those who served on active duty in the Armed Forces to "readjust" to civilian life. Indeed, as the appellants argue, Brief for Appellants 20 n. 18, "the very name of the statute—the Veterans' Readjustment Benefits Act—emphasizes congressional concern with the veteran's need for assistance in readjusting to civilian life."

Of course, merely labeling the class of beneficiaries under the Act as those having served on active duty in

the Armed Services cannot rationalize a statutory discrimination against conscientious objectors who have performed alternative civilian service, if, in fact, the lives of the latter were equally disrupted and equally in need of readjustment. See *Richardson* v. *Belcher,* 404 U. S. 78, 83 (1971). The District Court found that military veterans and alternative service performers share the characteristic during their respective service careers of "inability to pursue the educational and economic objectives that persons not subject to the draft law could pursue." 352 F. Supp., at 859. But this finding of similarity ignores that a common characteristic shared by beneficiaries and nonbeneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups. Congress expressly recognized that significant differences exist between military service veterans and alternative service performers, particularly in respect of the Act's purpose to provide benefits to assist in readjusting to civilian life. These differences "afford the basis for a different treatment within a constitutional framework," *McGinnis* v. *Royster,* 410 U. S. 263, 271 (1973).

First, the disruption caused by military service is quantitatively greater than that caused by alternative civilian service. A conscientious objector performing alternative service is obligated to work for two years. Service in the Armed Forces, on the other hand, involves a six-year commitment. While active duty may be limited to two years, the military veteran remains subject to an Active Reserve and then Standby Reserve obligation after release from active duty. This additional military service obligation was emphasized by Congress as a significant reason for providing veterans' readjustment benefits. A section entitled "Compulsory Reserve requirements" of the Senate Report states:

> "The hardships of cold war service are still further aggravated by the compulsory military Reserve obligation which the Government has imposed on all men who entered service after August 9, 1955. This obligation is, of course, in sharp contrast with the traditional military obligation which ends immediately upon discharge from active duty. More importantly, however, the Active Reserve obligation impedes the cold war veterans' full participation in civil life, which, in turn, again exposes them to unfair competition from their civilian contemporaries. The fact that veterans must discharge a post-Korean Reserve obligation involving drills and other military activities quite obviously enables their civilian contemporaries, by comparison, to make still more gains toward enjoyment of the fruits of our free enterprise society. . . . [F]or those men who wish to devote full time to their civil goals, the Reserve obligation constitutes a substantial supplementary burden." S. Rep. No. 269, 89th Cong., 1st Sess., 10 (1965).

Second, the disruptions suffered by military veterans and alternative service performers are qualitatively different. Military veterans suffer a far greater loss of personal freedom during their service careers. Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty. Congress was acutely aware of the peculiar disabilities caused by military service, in consequence of which military servicemen have a special need for readjustment benefits. The Senate Report accompanying the Act states:

> "Compulsory military service, because of its incompatibility with our traditions and national temperament, is not lightly imposed upon our

citizenry. Only war, or the imminent threat of war from unfriendly powers, creates the conditions, which, by the values of our society, justify this extraordinary deviation from our free enterprise, individualistic way of life. When, as now, the need for large but limited forces conflicts with our sense of equity which expects equal national service from all, we are concerned to find that less than half of our young men will ever be compelled to serve a substantial period in the *Military Establishment*.

. . . . .

"Action to redress the inequities of this situation is long overdue. Our post-Korean veterans are beset with problems almost identical with those to which the two previous GI bills were addressed. Like their fathers and elder brothers, post-Korean veterans lose time from their competitive civil lives directly because of military service. As a consequence, they lose valuable opportunities ranging from educational advantages to worthwhile job possibilities and potentially profitable business ventures. *In addition, after completion of their military service they confront serious difficulties during the transition to civil life.*

. . . . .

"The major part of the burden caused by these cold war conditions quite obviously falls upon those of our youths who are called to extended tours of active military service. *It is they who must serve in the Armed Forces throughout troubled parts of the world, thereby subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life.* It is they who, upon separation from

> service, find themselves far, far behind those in their age group whose lives have not been disrupted by military service." S. Rep. No. 269, 89th Cong., 1st Sess., 3, 6–7, 8 (1965) (emphasis added).

See also H. R. Rep. No. 1258, 89th Cong., 2d Sess., 4 (1966).[15] Congress' reliance upon these differences between military and civilian service is highlighted by the inclusion of Class I–A–O conscientious objectors, who serve in the military in noncombatant roles, within the class of beneficiaries entitled to educational benefits under the Act.[16]

These quantitative and qualitative distinctions, expressly recognized by Congress, form a rational basis for

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[15] Testimony and statements at a hearing on the proposed Veterans' Readjustment Benefits Act of 1966, before the Senate Subcommittee on Veterans' Affairs, reflect a consciousness of the special sacrifices made by veterans of military service. For example, Senator Yarborough, chairman of the subcommittee and author of the Act, remarked that "[t]he bill I have introduced provides an opportunity to demonstrate that we, as a nation, do recognize the extreme unique personal sacrifices extracted from our cold war veterans by their military service." "Their need is not based on the type of military duty they performed, but on the lack of opportunity to readjust back to civilian life after having been removed for 2 to 4 years." Hearings on S. 9 before the Subcommittee on Veterans' Affairs of the Senate Committee on Labor and Public Welfare, 89th Cong., 1st Sess., 6, 8 (1965). In testimony before the subcommittee Senator Mondale stated that "[t]he previous GI bills were not designed to reward veterans for the battle risks they ran, but were designed to assist them in readjusting to civilian life and in catching up to those whose lives were not disrupted by military service. And that is what the cold war GI bill is intended to do." *Id.*, at 152.

[16] Title 50 U. S. C. App. § 456 (j) provides that I–A–O conscientious objectors may be inducted into the Armed Forces and assigned to noncombatant service. Thus, I–A–O conscientious objectors perform "active duty" as defined in 38 U. S. C. § 101 (21) and are therefore eligible under 38 U. S. C. §§ 1652 (a) (1), 1661 (a) to receive veterans' educational benefits.

Congress' classification limiting educational benefits to military service veterans as a means of helping them readjust to civilian life; alternative service performers are not required to leave civilian life to perform their service.

The statutory classification also bears a rational relationship to objective (1) of § 1651, that of "enhancing and making more attractive service in the Armed Forces of the United States." By providing educational benefits to *all* military veterans who serve on active duty Congress expressed its judgment that such benefits would make military service more attractive to enlistees and draftees alike. Appellee concedes, Brief for Appellee 28, that this objective is rationally promoted by providing educational benefits to those who *enlist*. But, appellee argues, there is no rational basis for extending educational benefits to *draftees* who serve in the military and not to draftees who perform civilian alternative service, since neither group is induced by educational benefits to enlist. Therefore, appellee concludes, the Act's classification scheme does not afford equal protection because it fails to treat equally persons similarly circumstanced.

The two groups of draftees are, in fact, not similarly circumstanced. To be sure, a draftee, by definition, does not find educational benefits sufficient incentive to enlist. But, military service with educational benefits is obviously more attractive to a draftee than military service without educational benefits. Thus, the existence of educational benefits may help induce a registrant either to volunteer for the draft or not seek a lower Selective Service classification.[17] Furthermore, once drafted, educational benefits may help make military service more palatable to a draftee and thus reduce a draftee's unwillingness to be a soldier. On the other hand, because a

[17] The lower classifications are listed and defined in 32 CFR §§ 1622.1–1623.2 (1973).

conscientious objector bases his refusal to serve in the Armed Forces upon deeply held religious beliefs, we will not assume that educational benefits will make military service more attractive to him. When, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory.[18]

III

Finally, appellee argues that the District Court erred in holding that "the challenged exclusion does not abridge [appellee's] free exercise of his religion," 352 F. Supp., at 860. He contends that the Act's denial of benefits to alternative service conscientious objectors interferes with his free exercise of religion by increasing the price he must pay for adherence to his religious beliefs. That contention must be rejected in light of our decision in *Gillette* v. *United States,* 401 U. S. 437 (1971).

There, the petitioners, conscientious objectors to *particular* wars, argued that § 6 (j) of the Military Selective

[18] Appellee also contends that the Act violates his Fifth Amendment due process rights because, "[t]he exclusion of I–O conscientious objectors from the vital assistance provided by the Act's educational program is the product of a vindictive and harsh policy" whose "purpose is clearly to punish I–O conscientious objectors for adhering to their beliefs." Brief for Appellee 20, 51. To be sure, if that were the purpose of the exclusion of I–O conscientious objectors from the benefits of the Act, the classification would be unconstitutional, "[f]or if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U. S. Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 534 (1973). However, we have not been cited to, nor has our own research discovered, a single reference in the legislative history of the Act to support appellee's claim. We therefore find appellee's claim wholly lacking in merit.

Service Act of 1967, 50 U. S. C. App. § 456 (j), which limits an exemption from military service to those who conscientiously object to "participation in war *in any form*" (emphasis supplied), infringed their rights under the Free Exercise Clause by requiring them to abandon their religious beliefs and participate in what they deemed an unjust war or go to jail. We acknowledged that

> "the Free Exercise Clause bars 'governmental regulation of religious *beliefs* as such,' *Sherbert* v. *Verner*, 374 U. S. 398, 402 (1963), or interference with the dissemination of religious ideas. See *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). It prohibits misuse of secular governmental programs 'to impede the observance of one or all religions or . . . to discriminate invidiously between religions, . . . even though the burden may be characterized as being only indirect.' *Braunfeld* v. *Brown*, 366 U. S., at 607 (opinion of Warren, C. J.). And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." 401 U. S., at 462.

We made clear, however, that "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." "[Rather,] incidental burdens . . . [may be] strictly justified by substantial governmental interests . . . ." *Id.*, at 461, 462. Finding "the Government's interest in procuring the manpower necessary for military purposes, pursuant to the congressional grant of power to Congress

to raise and support armies[,] Art. I, § 8," "of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars," *id.*, at 462, 461, we held that § 6 (j) did not violate the Free Exercise Clause.

The challenged legislation in the present case does not require appellee and his class to make any choice comparable to that required of the petitioners in *Gillette*. The withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if, indeed, any burden exists at all.[19] As Part II, *supra*, demonstrates, the Act was enacted pursuant to Congress' Art. I, § 8, powers to advance the neutral, secular governmental interests of enhancing military service and aiding the readjustment of military personnel to civilian life. Appellee and his class were not included in this class of beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to do so would not rationally promote the Act's purposes. Thus, in light of *Gillette*, the Government's substantial interest in raising and supporting armies, Art. I, § 8, is of "a kind and weight" clearly sufficient to sustain the challenged legislation, for the burden upon appellee's free exercise of religion—the denial of the economic value of veterans' educational benefits under the Act—is not nearly of the same order

[19] By enacting legislation exempting conscientious objectors from the well-recognized and peculiar rigors of military service, Congress has bestowed relative benefits upon conscientious objectors by permitting them to perform their alternative service obligation as civilians. Thus, Congress' decision to grant educational benefits to military servicemen might arguably be viewed as an attempt to equalize the burdens of military service and alternative civilian service, rather than an effort by Congress to place a relative burden upon a conscientious objector's free exercise of religion. See Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 349 (1969).

or magnitude as the infringement upon free exercise of religion suffered by petitioners in *Gillette*. See also *Wisconsin* v. *Yoder*, 406 U. S. 205, 214 (1972).

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

In my dissent applicable to *Braunfield* v. *Brown*, 366 U. S. 599, I expressed the view that Pennsylvania's Sunday closing law was unconstitutional as applied to Sabbatarians, see 366 U. S., at 561, 575, 577. The State imposed a penalty on a Sabbatarian for keeping his shop open on the day which was the Sabbath of the Christian majority; and that seemed to me to exact an impermissible price for the free exercise of the Sabbatarian's religion. Indeed, in that case the Sabbatarian would be unable to continue in business if he could not stay open on Sunday and would lose his capital investment. See *id.*, at 611.

In *Girouard* v. *United States*, 328 U. S. 61, we held, in overruling *United States* v. *Schwimmer*, 279 U. S. 644, that the words of the oath prescribed by Congress for naturalization—"will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic"—should not be read as requiring the bearing of arms, as there is room under our Constitution for the support and defense of the Nation in times of great peril by those whose religious scruples bar them from shouldering arms. We said: "The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his role may be limited by religious convictions rather than by physical characteristics has

no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost." 328 U. S., at 64–65.

Closer in point to the present problem is *Sherbert* v. *Verner,* 374 U. S. 398, where a Seventh Day Adventist was denied unemployment benefits by the State because she would not work on Saturday, the Sabbath day of her faith. We held that that disqualification for unemployment benefits imposed an impermissible burden on the free exercise of her religion, saying: "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to [forgo] that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.,* at 404.

And we found no "compelling" state interest to justify the State's infringement of one's religious liberty in that manner. *Id.,* at 406–408.

In *Wisconsin* v. *Yoder,* 406 U. S. 205, we held that Wisconsin's compulsory school attendance law as applied to Amish children would gravely impair the free exercise of their religious beliefs.

The District Court in the present case said that the penalty which the present Act places on conscientious objectors is of a lesser "order or magnitude" [1] than that

[1] "First, the denial is felt, not immediately, as in *Sherbert,* but at a point in time substantially removed from that when a prospective conscientious objector must consider whether to apply for an exemption from military service. Secondly, the denial does not

which has been upheld in past cases. 352 F. Supp. 848, 860.

That is true; yet the discrimination against a man with religious scruples seems apparent. The present Act derives from a House bill that had as its purpose solely an education program to "help a veteran to follow the educational plan that he might have adopted had he never entered the Armed Forces." H. R. Rep. No. 1258, 89th Cong., 2d Sess., 5. Full benefits are available to occupants of safe desk jobs and the thousands of veterans who performed civilian type duties at home and for whom the rigors of the "war" were far from "totally disruptive," to use the Government's phrase. The benefits are provided, though the draftee did not serve overseas but lived with his family in a civilian community and worked from nine until five as a file clerk on a military base or attended college courses in his off-duty hours. No condition of hazardous duty was attached to the educational assistance program. As Senator Yarborough said,[2] the benefits would accrue even to those who never served overseas, because their "educational progress and opportunity" "[have] been impaired in just as serious and damaging a fashion as if they had served on distant shores. Their educational needs are no less than those of their comrades who served abroad."

But the line drawn in the Act is between Class I–O conscientious objectors who performed alternative civilian

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produce a positive economic injury of the sort effected by a Sunday closing law or ineligibility for unemployment payments. Considering these factors, the court doubts that the denial tends to make a prospective alternate service performer choose between following and not following the dictates of his conscience." 352 F. Supp. 848, 860.

[2] Hearings on Legislation to Provide GI Benefits for Post-Korean Veterans before the House Committee on Veterans' Affairs, 89th Cong., 1st Sess., 2899.

service and all other draftees. Such conscientious objectors get no educational benefits whatsoever. It is, indeed, demeaning to those who have religious scruples against shouldering arms to suggest, as the Government does, that those religious scruples must be susceptible of compromise before they will be protected. The urge to forgo religious scruples to gain a monetary advantage would certainly be a burden on the Free Exercise Clause in cases of those who were spiritually weak. But that was not the test in *Sherbert* or *Girouard*. We deal with people whose religious scruples are unwavering. Those who would die at the stake for their religious scruples may not constitutionally be penalized by the Government by the exaction of penalties because of their free exercise of religion. Where Government places a price on the free exercise of one's religious scruples it crosses the forbidden line.[3] The issue of "coercive effects," to use another

[3] *Gillette* v. *United States*, 401 U. S. 437, is irrelevant to the present case. There we were concerned with whether the petitioners were validly excluded from classification as conscientious objectors. Here the question is whether the Government can penalize the exercise of conscience it concedes is valid and which exempts these draftees from military service. Moreover, in *Gillette* we relied upon the fact that the Government's classification was religiously neutral, *id.*, at 451, imposed only "incidental burdens" on the exercise of conscience, and was "strictly justified by substantial governmental interests that relate directly to the very impacts questioned," *id.*, at 462. Here the classification is not neutral but excludes only those conceded by the Government to have religious-based objections to war; and thus the burden it imposes on religious beliefs is not "incidental." And here we have no governmental interest even approaching that found in *Gillette*—the danger that, because selective objection to war could not be administered fairly, our citizens would conclude that "those who go to war are chosen unfairly or capriciously [resulting in] a mood of bitterness and cynicism [that] might corrode the . . . values of willing performance of a citizen's duties that are the very heart of free government." *Id.*, at 460. The only governmental interest here

Government phrase, is irrelevant. Government, as I read the Constitution and the Bill of Rights, may not place a penalty on anyone for asserting his religious scruples. That is the nub of the present case and the reason why the judgment below should be affirmed.

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is the financial one of denying this appellee and his class educational benefits. That in my view is an invidious discrimination and a penalty on those who assert their religious scruples against joining the Armed Services which shoulder arms.

HERNANDEZ ET AL. *v.* VETERANS' ADMINISTRATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–700. Argued December 11, 1973—Decided March 4, 1974

Petitioners, who were denied educational benefits under the Veterans' Readjustment Benefits Act of 1966 because, as conscientious objectors exempt from the military service who performed alternative civilian service, they were ineligible for such benefits, brought actions challenging the constitutionality, on First and Fifth Amendment grounds, of the provisions of the Act making them ineligible. The District Court dismissed the actions on the grounds that jurisdiction was barred by 38 U. S. C. § 211 (a) and petitioners' constitutional claims were insubstantial and without merit. The Court of Appeals affirmed on the basis of the jurisdictional bar. *Held:* Section 211 (a) does not bar judicial consideration of constitutional challenges to veterans' benefits legislation. *Johnson* v. *Robison, ante,* p. 361. P. 393.

467 F. 2d 479, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a statement concurring in the result, *post,* p. 393.

Jack R. Petranker, pro hac vice, and *Lawrence L. Curtice* argued the cause for petitioners. With them on the briefs were *Stephen V. Bomse* and *Charles C. Marson.*

Gerald P. Norton argued the cause for respondents. On the brief were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Harriet S. Shapiro, Morton Hollander,* and *William Kanter.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, like the appellee and his class in *Johnson* v. *Robison, ante,* p. 361, are Class I–O conscientious ob-

jectors who, upon completion of alternative civilian service pursuant to § 6 (j) of the Military Selective Service Act, 50 U. S. C. App. § 456 (j), and the governing regulations of the Selective Service System, 32 CFR, Part 1660, applied for educational benefits provided by the Veterans' Readjustment Benefits Act of 1966. The Veterans' Administration denied petitioners' application for the reasons upon which appellee Robison's request was denied, *i. e.*, because a Class I–O conscientious objector who has performed alternative civilian service does not qualify under 38 U. S. C. § 1652 (a)(1) as a "veteran who . . . served on active duty" (defined in 38 U. S. C. § 101 (21) as "full-time duty in the Armed Forces"), and is therefore not an "eligible veteran" entitled under 38 U. S. C. § 1661 (a) to veterans' educational benefits provided by the Veterans' Readjustment Benefits Act of 1966.

Alleging that those sections of the 1966 Act discriminate against conscientious objectors in violation of the Fifth Amendment, and infringe the Religion Clauses of the First Amendment, petitioners filed two actions seeking declaratory, injunctive, and mandamus relief and requesting the convening of a three-judge district court. The District Court consolidated the two cases and granted the Government's motion to dismiss on the grounds that "plaintiffs' requests for affirmative relief are not within the jurisdiction of this Court due to the mandate of 38 U. S. C. § 211 (a) . . . [and] the plaintiffs' challenge . . . based on alleged violations of the Fifth and First Amendments to the United States Constitution are [*sic*] insubstantial and without merit." 339 F. Supp. 913, 916 (ND Cal. 1972). Notwithstanding the District Court's dismissal of petitioners' *constitutional* claims on the ground of insubstantiality, the Court of Appeals, as we read that court's opinion, construed the order of dismissal as based solely upon the jurisdictional bar of § 211 (a), and af-

firmed the District Court on that ground. 467 F. 2d 479 (1972). We granted certiorari and set the case for oral argument with *Johnson* v. *Robison, ante,* p. 361. 411 U. S. 981 (1973).

We have held today in *Johnson* v. *Robison* that § 211 (a) does not bar judicial consideration of constitutional challenges to veterans' benefits legislation. Accordingly, the judgment of the Court of Appeals is vacated and the case remanded for further proceedings consistent with our opinion in *Johnson* v. *Robison.*

It is so ordered.

MR. JUSTICE DOUGLAS concurs in the result for the reasons stated in his dissenting opinion in *Johnson* v. *Robison, ante,* p. 386.

TELEPROMPTER CORP. ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72–1628. Argued January 7, 1974—Decided March 4, 1974*

Several creators and producers of copyrighted television programs brought this suit claiming that defendants had infringed their copyrights by intercepting broadcast transmissions of copyrighted material and rechanneling these programs through various community antenna television (CATV) systems to paying subscribers. The District Court dismissed the complaint on the ground that the cause of action was barred by this Court's decision in *Fortnightly Corp.* v. *United Artists Television*, 392 U. S. 390. On appeal, the Court of Appeals divided CATV systems into two categories for copyright purposes: (1) those where the broadcast signal was already "in the community" served by the system, and could be received there either by a community antenna or by standard rooftop or other antennae belonging to the owners of television sets; and (2) those where the systems imported "distant" signals from broadcasters so far away from the CATV community that the foregoing local facilities could not normally receive adequate signals. Holding that CATV reception and retransmission of non-"distant" signals do not constitute copyright infringement, but that reception and retransmission of "distant" signals amount to a "performance" and thus constitute copyright infringement, the court affirmed as to those systems in the first category, but reversed and remanded as to the remaining systems. *Held:*

1. The development and implementation, since the *Fortnightly* decision, of new functions of CATV systems—program origination, sale of commercials, and interconnection with other CATV systems—even though they may allow the systems to compete more effectively with the broadcasters for the television market, do not convert the entire CATV operation, regardless of distance from

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*Together with No. 72–1633, *Columbia Broadcasting System, Inc., et al.* v. *Teleprompter Corp. et al.*, also on certiorari to the same court.

the broadcasting station, into a "broadcast function," thus subjecting the CATV operators to copyright infringement liability, but are extraneous to a determination of such liability, since in none of these functions is there any nexus with the CATV operators' reception and rechanneling of the broadcasters' copyrighted materials. Pp. 402–405.

2. The importation of "distant" signals from one community into another does not constitute a "performance" under the Copyright Act. Pp. 406–415.

(a) By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers, as the reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer. P. 408.

(b) Even in exercising its limited freedom to choose among various "distant" broadcasting stations, a CATV operator cannot be viewed as "selecting" broadcast signals, since when it chooses which broadcast signals to rechannel, its creative function is then extinguished and it thereafter "simply carr[ies], without editing, whatever programs [it] receive[s]," *Fortnightly Corp.* v. *United Artists Television*, *supra*, at 400. Nor does a CATV system importing "distant" signals procure and propagate them to the public, since it is not engaged in converting the sights and sounds of an event or a program into electronic signals available to the public, the signals it receives and rechannels having already been "released to the public" even though not normally available to the specific segment of the public served by the CATV system. Pp. 409–410.

(c) The fact that there have been shifts in current business and commercial relationships in the communications industry as a result of the CATV systems' importation of "distant" signals, does not entail copyright infringement liability, since by extending the range of viewability of a broadcast program, the CATV systems do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor from advertisers on the basis of all viewers who watch the particular program. Pp. 410–414.

476 F. 2d 338, affirmed in part, reversed in part, and remanded to District Court.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion dissenting in part, *post*, p. 415. DOUGLAS, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 416.

Robert C. Barnard argued the cause for petitioners in No. 72–1628 and for respondents in No. 72–1633. With him on the briefs were *R. Michael Duncan, Charles F. Lettow,* and *David Z. Rosensweig.*

Asa D. Sokolow and *Seymour Graubard* argued the cause for respondents in No. 72–1628 and for petitioners in No. 72–1633. With them on the briefs were *Charles H. Miller, Royal E. Blakeman, Bertrand H. Weidberg,* and *Eugene Z. DuBose.*†

MR. JUSTICE STEWART delivered the opinion of the Court.

The plaintiffs in this litigation, creators and producers of televised programs copyrighted under the provisions of the Copyright Act of 1909, as amended, 17 U. S. C. § 1 *et seq.*, commenced suit in 1964 in the United States District Court for the Southern District of New York, claiming that the defendants had infringed their copyrights by intercepting broadcast transmissions of copy-

†*Steven R. Rivkin* and *Peter H. Schuck* filed a brief for the Consumers Union of the United States, Inc., et al., as *amici curiae* in both cases. Briefs of *amici curiae* in No. 72–1628 were filed by *Bernard G. Segal, Ira P. Tiger,* and *Corydon B. Dunham* for the National Broadcasting Co., Inc.; by *Stuart Feldstein* and *Stephen A. Gold* for the National Cable Television Assn.; by *Irwin Karp* for the Authors League of America, Inc.; by *Paul P. Selvin, William Berger,* and *William B. Haughton* for the Writers Guild of America et al.; and by *Louis Nizer, Gerald Meyer, Gerald F. Phillips, Arthur Scheiner,* and *Robert D. Hadl* for the Motion Picture Association of America, Inc., et al. *Herman Finkelstein* filed a brief for the American Society of Composers, Authors, and Publishers as *amicus curiae* in No. 72–1633.

righted material and rechanneling these programs through various community antenna television (CATV) systems to paying subscribers.[1] The suit was initially

[1] The exclusive rights of copyright owners are specified in § 1 of the Copyright Act:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

"(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it

stayed by agreement of the parties, pending this Court's decision in *Fortnightly Corp.* v. *United Artists Television*, 392 U. S. 390. In that case, decided in 1968, we held that the reception and distribution of television broadcasts by the CATV systems there involved did not constitute a "performance" within the meaning of the Copyright Act, and thus did not amount to copyright infringement.[2] After that decision the plaintiffs in the present litigation filed supplemental pleadings in which they sought to distinguish the five CATV systems challenged here from those whose operations had been found not to constitute copyright infringement in *Fortnightly*.[3] The District Court subsequently dismissed the complaint on the ground that the plaintiffs' cause of action was barred by the *Fortnightly* decision. 355 F. Supp. 618. On appeal to the United States Court of Appeals for the

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in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . ." 17 U. S. C. § 1.

[2] Although the Copyright Act does not contain an explicit definition of infringement, it is settled that unauthorized use of copyrighted material inconsistent with the "exclusive rights" enumerated in § 1, constitutes copyright infringement under federal law. See 1 M. Nimmer, Copyright § 100, p. 376 (1973). Use of copyrighted material not in conflict with a right secured by § 1, however, no matter how widespread, is not copyright infringement. "The fundamental [is] that 'use' is not the same thing as 'infringement,' that use short of infringement is to be encouraged . . . ." B. Kaplan, An Unhurried View of Copyright 57 (1967).

It appears to be conceded that liability in this case depends entirely on whether the defendants did "perform" the copyrighted works. Teleprompter has not contended in this Court that, if it did "perform" the material, its performance was not "in public" within the meaning of § 1 (c) of the Act (nondramatic literary works) or "publicly" under § 1 (d) (dramatic works). Cf. *Fortnightly Corp.* v. *United Artists Television*, 392 U. S. 390, 395 n. 13.

[3] The plaintiffs' amended complaints also contained allegations of additional copyright infringements on various dates in 1969 and 1971.

Second Circuit, the judgment was affirmed in part and reversed in part, and the case was remanded to the District Court for further proceedings. 476 F. 2d 338. Both the plaintiffs and the defendants petitioned for certiorari, and, because of the seemingly important questions of federal law involved, we granted both petitions. 414 U. S. 817.

I

The complaint alleged that copyright infringements occurred on certain dates at each of five illustrative CATV systems located in Elmira, New York; Farmington, New Mexico; Rawlins, Wyoming; Great Falls, Montana; and New York City. The operations of these systems typically involved the reception of broadcast beams by means of special television antennae owned and operated by Teleprompter, transmission of these electronic signals by means of cable or a combination of cable and point-to-point microwave [4] to the homes of

[4] The Court of Appeals in this case described the differences between point-to-point microwave transmission and broadcasting in the following terms:

"A microwave link involves the transmission of signals through the air. However, microwave transmission in itself is not broadcasting. A broadcast signal, according to 47 U. S. C. § 153 (*o*), is transmitted by a broadcaster for '[reception] by the public.' In the case of microwave, the signal is focused and transmitted in a narrow beam aimed with precision at the receiving points. Thus, microwave transmission is point-to-point communication. The receiving antenna must be in the path of the signal beam. If the transmission must cover a considerable distance, the microwave signal is transmitted to the first receiving point from which it is retransmitted to another receiving point, and this process is repeated until the signal reaches the point from which it is distributed by cable to subscribers." 476 F. 2d 338, 343 n. 6.

The plaintiffs argued in the District Court and in the Court of Appeals that "the use of microwave, in and of itself, is sufficient to make a CATV system functionally equivalent to a broadcaster

subscribers, and the conversion of the electromagnetic signals into images and sounds by means of the subscribers' own television sets.[5] In some cases the distance between the point of original transmission and the ultimate viewer was relatively great—in one instance more than 450 miles—and reception of the signals of those stations by means of an ordinary rooftop antenna, even an extremely high one, would have been impossible because of the curvature of the earth and other topographical factors. In others, the original broadcast was relatively close to the customers' receiving sets and could normally have been received by means of standard television equipment. Between these extremes were systems involving intermediate distances where the broadcast signals could have been received by the customers' own television antennae only intermittently, imperfectly, and sporadically.[6]

Among the various actual and potential CATV operations described at trial the Court of Appeals discerned,

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and thus subject to copyright liability . . . ." *Id.*, at 348–349. This contention was rejected by the Court of Appeals on the ground that microwave transmission "is merely an alternative, more economical in some circumstances, to cable in transmitting a broadcast signal from one point in a CATV system to another," *id.*, at 349, and the argument has not been renewed in this Court.

[5] For general descriptions of CATV systems and their operation, see *United States* v. *Southwestern Cable Co.*, 392 U. S. 157; M. Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry (1965); Note, Regulation of Community Antenna Television, 70 Col. L. Rev. 837 (1970); Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366 (1965).

[6] In two of the cities involved in this suit signals not normally receivable by household sets because of distance or terrain could be received by rooftop antennae because of the use by the broadcasting stations of "translators," under license from the Federal Communications Commission, which rebroadcast a specific station's signals. See 476 F. 2d, at 344 and n. 7.

for copyright purposes, two distinct categories. One category included situations where the broadcast signal was already "in the community" served by a CATV system, and could be received there either by standard rooftop or other antennae belonging to the owners of television sets or by a community antenna erected in or adjacent to the community. Such CATV systems, the court found, performed essentially the same function as the CATV systems in *Fortnightly* in that they "no more than enhance the viewer's capacity to receive the broadcaster's signals," 392 U. S., at 399. The second category included situations where the CATV systems imported "distant" signals from broadcasters so far away from the CATV community that neither rooftop nor community antennae located in or near the locality could normally receive signals capable of providing acceptable images.

The Court of Appeals determined that "[w]hen a CATV system is performing this second function of distributing signals that are beyond the range of local antennas, . . . to this extent, it is functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed to subscribers on these imported signals." 476 F. 2d, at 349. The Court of Appeals found that in two of the operations challenged in the complaint—those in Elmira and New York City—the signals received and rechanneled by the CATV systems were not "distant" signals, and as to these claims the court affirmed the District Court's dismissal of the complaint. As to the three remaining systems, the case was remanded for further findings in order to apply the appellate court's test for determining whether or not the signals were "distant." [7] In No. 72–1633 the plaintiffs

[7] The Court of Appeals acknowledged that a determination of what is a "distant" signal was "difficult," and "that a precise judicial definition of a distant signal is not possible." 476 F. 2d, at 350. FCC

ask this Court to reverse the determination of the Court of Appeals that CATV reception and retransmission of signals that are not "distant" do not constitute copyright infringement. In No. 72–1628, the defendants ask us to reverse the appellate court's determination that reception and retransmission of "distant" signals amount to a "performance," and thus constitute copyright infringement on the part of the CATV systems.

II

We turn first to the assertions of the petitioners in No. 72–1633 that irrespective of the distance from the broadcasting station, the reception and retransmission of its signal by a CATV system constitute a "performance" of a copyrighted work. These petitioners contend that a number of significant developments in the technology and actual operations of CATV systems mandate a reassessment of the conclusion reached in *Fortnightly* that CATV systems act only as an extension of a tele-

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regulations at one time provided that for regulatory purposes a distant signal was one "which is extended or received beyond the Grade B contour of that station." 47 CFR § 74.1101 (i) (1971) (removed in 37 Fed. Reg. 3278 (1972)). A Grade B contour was defined as a line along which good reception may be expected 90% of the time at 50% of the locations. *United States* v. *Southwestern Cable Co., supra,* at 163 n. 16. The Court of Appeals recognized that "this definition [is] unsuitable for copyright purposes because . . . any definition phrased in terms of what can be received in area homes using rooftop antennas would fly in the face of the mandate of *Fortnightly*." 476 F. 2d, at 350. The court found instead that "it is easier to state what is not a distant signal than to state what is a distant signal. Accordingly, we have concluded that any signal capable of projecting, without relay or retransmittal, an acceptable image that a CATV system receives off-the-air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community is not a distant signal." *Id.,* at 351 (footnote omitted).

vision set's function of converting into images and sounds the signals made available by the broadcasters to the public. In *Fortnightly* this Court reviewed earlier cases in the federal courts and determined that while analogies to the functions of performer and viewer envisioned by the Congress in 1909—that of live or filmed performances watched by audiences—were necessarily imperfect, a simple line could be drawn: "Broadcasters perform. Viewers do not perform." 392 U. S., at 398 (footnotes omitted). Analysis of the function played by CATV systems and comparison with those of broadcasters and viewers convinced the Court that CATV systems fall "on the viewer's side of the line." *Id.*, at 399 (footnote omitted).

> "The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." *Id.*, at 400–401 (footnotes omitted).

The petitioners claim that certain basic changes in the operation of CATV systems that have occurred since *Fortnightly* bring the systems in question here over to the broadcasters' "side of the line." In particular, they emphasize three developments that have taken place in the few years since the *Fortnightly* decision. First, they point out that many CATV systems, including some of

those challenged here, originate programs wholly independent of the programs that they receive off-the-air from broadcasters and rechannel to their subscribers.[8] It is undisputed that such CATV systems "perform" those programs which they produce and program on their own; but it is contended that, in addition, the engagement in such original programing converts the entire CATV operation into a "broadcast function," and thus a "performance" under the Copyright Act. Second, these petitioners assert that Teleprompter, unlike the CATV operators sued in *Fortnightly*, sells advertising time to commercial interests wishing to sell goods or services in the localities served by its CATV systems. The sale of such commercials, they point out, was considered in the *Fortnightly* opinion as a function characteristically performed by broadcasters. *Id.*, at 400 n. 28, citing *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F. Supp. 315, 325. Finally, they contend that by engaging in interconnection with other CATV systems—whereby one CATV system that originates a program sells the right to redistribute it to other CATV systems that carry it simultaneously to their own subscribers—the CATV operators have similarly transferred their functions into that of broadcasters, thus subjecting themselves to copyright infringement liability.[9]

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[8] Program origination initially consisted of simple arrangements on spare channels using automated cameras providing time, weather, news ticker, or stock ticker information, and aural systems with music or news announcements. The function has been expanded to include coverage of sports and other live events, news services, moving picture films, and specially created dramatic and nondramatic programs. See CATV-First Report and Order, 20 F. C. C. 2d 201; *United States* v. *Midwest Video Corp.*, 406 U. S. 649.

[9] The Court of Appeals limited its discussion of interconnection among CATV systems to two instances of live coverage of championship heavyweight boxing contests. While the respondents contend

The copyright significance of each of these functions—program origination, sale of commercials, and interconnection—suffers from the same logical flaw: in none of these operations is there any nexus with the defendants' reception and rechanneling of the broadcasters' copyrighted materials. As the Court of Appeals observed with respect to program origination, "[e]ven though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations, and we cannot sensibly say that the system becomes a 'performer' of the broadcast programming when it offers both origination and reception services, but remains a nonperformer when it offers only the latter." 476 F. 2d, at 347. Similarly, none of the programs accompanying advertisements sold by CATV or carried via an interconnection arrangement among CATV systems involved material copyrighted by the petitioners.[10]

For these reasons we hold that the Court of Appeals was correct in determining that the development and implementation of these new functions, even though they may allow CATV systems to compete more effectively with the broadcasters for the television market, are simply extraneous to a determination of copyright infringement liability with respect to the reception and retransmission of broadcasters' programs.

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that additional examples of interconnection were presented in the trial testimony, they do not suggest that material copyrighted by anyone other than the CATV operators was carried by any such interconnection, and thus the exact number of such instances is of no significance.

[10] While the technology apparently exists whereby a CATV system could retransmit to its subscribers broadcast programs taken off-the-air but substitute its own commercials for those appearing in the broadcast, none of the instances of claimed infringement involved such a process.

III

In No. 72–1628 Teleprompter and its subsidiary, Conley Electronics Corp., seek a reversal of that portion of the Court of Appeals' judgment that determined that the importation of "distant" signals from one community into another constitutes a "performance" under the Copyright Act. In concluding that rechanneling of "distant" signals constitutes copyright infringement while a similar operation with respect to more nearby signals does not, the court relied in part on a description of CATV operations contained in this Court's opinion in *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, announced a week before the decision in *Fortnightly:*

> "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.*, at 163.

The Court in *Southwestern Cable,* however, was faced with conflicting assertions concerning the jurisdiction of the Federal Communications Commission to regulate in the public interest the operations of CATV systems. Insofar as the language quoted had other than a purely descriptive purpose, it was related only to the issue of regulatory authority of the Commission. In that context it did not and could not purport to create any separation of functions with significance for copyright purposes.[11]

[11] The FCC has consistently contended that it is without power to alter rights emanating from other sources, including the Copyright Act. In 1966 it indicated that its proposed rules regulating CATV

In the briefs and at oral argument various rationales for the distinction adopted by the Court of Appeals have been advanced. The first, on which the court itself relied, is the assertion that by importing signals from distant communities the CATV systems do considerably more than "enhance the viewer's capacity to receive the broadcaster's signals," *Fortnightly,* 392 U. S., at 399, and instead "bring signals into the community that would not otherwise be receivable on an antenna, even a large community antenna, erected in that area." 476 F. 2d, at 349. In concluding that such importation transformed the CATV systems into performers, the Court of Appeals misconceived the thrust of this Court's opinion in *Fortnightly.*

In the *Fortnightly* case the Court of Appeals had concluded that a determination of whether an electronic function constituted a copyright "performance" should depend on "how much did the [CATV system] do to bring about the viewing and hearing of a copyrighted

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operations would not "affect in any way the pending copyright suits, involving as they do matters entirely beyond [the FCC's] jurisdiction." Second Report and Order, Community Antenna Television Systems, 2 F. C. C. 2d 725, 768. This position is consistent with the terms of the Communications Act of 1934, the source of the Commission's regulatory power, which provides, in part:

"Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U. S. C. § 414.

Thus, it is highly unlikely that the "distant" signal definition adopted by the Commission or a differentiation of function based on such a definition was intended to or could have copyright significance. Indeed, as noted, the Court of Appeals in the present case found that the Commission's definition of a "distant" signal was unsatisfactory for determining if a "performance" under the Copyright Act had occurred. See n. 7, *supra.*

work." 377 F. 2d 872, 877. This quantitative approach was squarely rejected by this Court:

> "[M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. . . . Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception." 392 U. S., at 397.

By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers. When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.

In *Fortnightly* the Court reasoned that "[i]f an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set," *id.*, at 400, and concluded that "[t]he only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur." *Ibid.* In the case of importation of "distant" signals, the function is essentially the same. While the ability or inclination of an individual to erect his own antenna might decrease with respect to distant signals because of the increased cost of bringing

the signal to his home, his status as a "nonperformer" would remain unchanged. Similarly, a CATV system does not lose its status as a nonbroadcaster, and thus a "nonperformer" for copyright purposes, when the signals it carries are from distant rather than local sources.

It is further argued that when a CATV operator increases the number of broadcast signals that it may receive and redistribute, it exercises certain elements of choice and selection among alternative sources and that this exercise brings it within scope of the broadcaster function. It is pointed out that some of the CATV systems importing signals from relatively distant sources could with equal ease and cost have decided to import signals from other stations at no greater distance from the communities they serve. In some instances, the CATV system here involved "leapfrogged" nearer broadcasting stations in order to receive and rechannel more distant programs.[12] By choosing among the alternative broadcasting stations, it is said, a CATV system functions much like a network affiliate which chooses the mix of national and local program material it will broadcast.

The distinct functions played by broadcasters and CATV systems were described in *Fortnightly* in the following terms:

> "Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to

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[12] For example, it was represented in a brief before this Court that the Farmington, New Mexico, CATV system imported signals from a Los Angeles station even though 113 other stations were closer or equidistant, including a number which, unlike the Los Angeles station, were in the same time zone as the Farmington community.

> the public and carry them by private channels to additional viewers." *Id.*, at 400.

Even in exercising its limited freedom to choose among various broadcasting stations, a CATV operator simply cannot be viewed as "selecting," "procuring," or "propagating" broadcast signals as those terms were used in *Fortnightly*. When a local broadcasting station selects a program to be broadcast at a certain time, it is exercising a creative choice among the many possible programs available from the national network with which it is affiliated, from copyright holders of new or rerun motion pictures, or from its own facilities to generate and produce entirely original program material. The alternatives are myriad, and the creative possibilities limited only by scope of imagination and financial considerations. An operator of a CATV system, however, makes a choice as to which broadcast signals to rechannel to its subscribers, and its creative function is then extinguished. Thereafter it "simply carr[ies], without editing, whatever programs [it] receive[s]." *Ibid.* Moreover, a CATV system importing "distant" signals does not procure programs and propagate them to the public, since it is not engaged in converting the sights and sounds of an event or a program into electronic signals available to the public. The electronic signals it receives and rechannels have already been "released to the public" even though they may not be normally available to the specific segment of the public served by the CATV system.

Finally, it is contended that importation of "distant" signals should entail copyright infringement liability because of the deleterious impact of such retransmission upon the economics and market structure of copyright licensing. When a copyright holder first licenses a copyrighted program to be shown on broadcast television, he

typically cannot expect to recoup his entire investment from a single broadcast. Rather, after a program has had a "first run" on the major broadcasting networks, it is often later syndicated to affiliates and independent stations for "second run" propagation to secondary markets. The copyright holders argue that if CATV systems are allowed to import programs and rechannel them into secondary markets they will dilute the profitability of later syndications, since viewer appeal, as measured by various rating systems, diminishes with each successive showing in a given market. We are told that in order to ensure "the general benefits derived by the public from the labors of authors," *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 127, and " 'the incentive to further efforts for the same important objects,' " *id.,* at 127–128, citing *Kendall* v. *Winsor,* 21 How. 322, 328, current licensing relationships must be maintained.

In the television industry, however, the commercial relations between the copyright holders and the licensees on the one hand and the viewing public on the other are such that dilution or dislocation of markets does not have the direct economic or copyright significance that this argument ascribes to it. Unlike propagators of other copyrighted material, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material—that is, the television viewers—but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcasters a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who will watch the program. While, as members of the

general public, the viewers indirectly pay for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.[13]

By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder he has no control over the segment of the population which may view the program—the broadcaster cannot beam the program exclusively to the young or to the old, only to women or only to men—but rather he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission plus those who may receive "local signals" via a CATV system, broadcasters whose reception ranges have been extended by means of "distant" signal CATV rechanneling will merely have a different and larger viewer market.[14] From the point of

[13] Some commentators have suggested that if CATV systems must pay license fees for the privilege of retransmitting copyrighted broadcast programs, the CATV subscribers will in effect be paying twice for the privilege of seeing such programs: first through increased prices for the goods and services of the advertisers who pay for the television broadcasts and a second time in the increased cost of the CATV service. Note, CATV and Copyright Liability: On a Clear Day You Can See Forever, 52 Va. L. Rev. 1505, 1515 (1966); Note, CATV and Copyright Liability, 80 Harv. L. Rev. 1514, 1522–1523 (1967). See n. 15, *infra*.

[14] Testimony and exhibits introduced in the District Court indicate that the major rating services cover in their compilations statistics concerning the entire number of viewers of a particular program, including those who receive the broadcast via "distant" transmission

view of the broadcasters, such market extension may mark a reallocation of the potential number of viewers each station may reach, a fact of no direct concern under the Copyright Act. From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.[15]

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over CATV systems. The weight given such statistics by advertisers who bid for broadcast time and pay the fees which support the broadcasting industry was not, however, established. See n. 15, *infra*.

[15] It is contended that copyright holders will necessarily suffer a net loss from the dissemination of their copyrighted material if license-free use of "distant" signal importation is permitted. It is said that importation of copyrighted material into a secondary market will result in a loss in the secondary market without increasing revenues from the extended primary market on a scale sufficient to compensate for that loss. The assumption is that local advertisers supporting "first run" programs will be unlikely to pay significantly higher fees on the basis of additional viewers in a "distant" market because such viewers will typically have no commercial interest in the goods and services sold by purely local advertisers. For discussion of the possible impact of CATV "distant" signal importation on advertiser markets for broadcast television, see 52 Va. L. Rev., at 1513–1516; 80 Harv. L. Rev., at 1522–1525. The Court of Appeals noted that "[n]o evidence was presented in the court below to show that regional or local advertisers would be willing to pay greater fees because the sponsored program will be exhibited in some distant market, or that national advertisers would pay more for the relatively minor increase in audience size that CATV carriage would yield for a network program," and concluded that "[i]ndeed, economics and common sense would impel one to an opposite conclusion." 476 F. 2d, at 342 n. 2. Thus, no specific findings of fact were made concerning the precise impact of "distant" signal retransmission on the value of program copyrights. But such a showing would be of very little relevance to the copyright question we decide here. At issue in this

These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.[16]

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case is the limited question of whether CATV transmission of "distant" signals constitutes a "performance" under the Copyright Act. While securing compensation to the holders of copyrights was an essential purpose of that Act, freezing existing economic arrangements for doing so was not. It has been suggested that the best theoretical approach to the problem might be "[a] rule which called for compensation to copyright holders only for the actual advertising time 'wasted' on local advertisers unwilling to pay for the increase in audience size brought about by the cable transmission," Note, 87 Harv. L. Rev. 665, 675 n. 32 (1974). But such a rule would entail extended factfinding and a legislative, rather than a judicial, judgment. In any event, a determination of the best alternative structure for providing compensation to copyright holders, or a prediction of the possible evolution in the relationship between advertising markets and the television medium, is beyond the competence of this Court.

[16] The pre-*Fortnightly* history of efforts to update the Copyright Act to deal with technological developments such as CATV was reviewed in the *Fortnightly* opinion, 392 U. S., at 396 n. 17. At that time legislative action to revise the copyright laws so as to resolve copyright problems posed by CATV was of such apparent imminence that the Solicitor General initially suggested to this Court that it defer judicial resolution of the *Fortnightly* case in order to allow a speedy completion of pending legislative proceedings. Those legislative activities, however, did not bear fruit, apparently because of the diversity and delicacy of the interests affected by the CATV problem. See 117 Cong. Rec. 2001 (1971) (remarks of Sen. McClellan). Further attempts at revision in the 91st Congress, S.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and these cases are remanded to the District Court with directions to reinstate its judgment.

It is so ordered.

MR. JUSTICE BLACKMUN, dissenting in part.

I was not on the Court when *Fortnightly Corp.* v. *United Artists Television,* 392 U. S. 390 (1968), was decided. Were that case presented for the first time today, I would be in full agreement with what Mr. Justice Fortas said in dissent. I would join his unanswered—and, for me, unanswerable—reliance on Mr. Justice Brandeis' unanimous opinion in *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191 (1931). But *Fortnightly* has been decided, and today the Court adheres to the principles it enunciated and to the simplistic basis* on which it rests.

With *Fortnightly* on the books, I, like MR. JUSTICE DOUGLAS, would confine it "to its precise facts and leave any extension or modification to the Congress." *Post,* at 422. The United States Court of Appeals for the Second Circuit decided this litigation as best it could with the difficulties inherent in, and flowing from, *Fortnightly* and the Copyright Act, and within such elbow-room as was left for it to consider the expanding tech-

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542, and the 92d Congress, S. 644, met with a similar lack of success. At present, Senate hearings in the Subcommittee on Patents, Trademarks and Copyrights have been held on a bill that would amend the Copyright Act, S. 1361, but the bill has not yet been reported out of that subcommittee. A companion bill has been introduced in the House of Representatives, H. R. 8186, and referred to Judiciary Committee No. 3, but no hearings have yet been scheduled.

* "Broadcasters perform. Viewers do not perform." 392 U. S., at 398 (footnotes omitted).

nology of modern-day CATV. Judge Lumbard's opinion, 476 F. 2d 338, presents an imaginative and well-reasoned solution without transgressing upon the restrictive parameters of *Fortnightly*. I am in agreement with that opinion and would therefore affirm the judgment.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

The Court today makes an extraordinary excursion into the legislative field. In *Fortnightly Corp.* v. *United Artists Television*, 392 U. S. 390, the lower courts had found infringement of the copyright, but this Court reversed, holding that the CATV systems in *Fortnightly* were merely a "reception service" and were "on the viewer's side of the line," *id.*, at 399, and therefore did not infringe the Copyright Act. They functioned by cable, reaching into towns which could not receive a TV signal due, say, to surrounding mountains, and expanded the reach of the TV signal beyond the confines of the area which a broadcaster's telecast reached.

Whatever one thinks of *Fortnightly*, we should not take the next step necessary to give immunity to the present CATV organizations. Unlike those involved in *Fortnightly*, the present CATV's are functionally equivalent to a regular broadcaster. TV waves travel in straight lines, thus reaching a limited area on the earth's curved surface. This scientific fact has created for regulatory purposes separate television markets.[1] Those whose tele-

[1] The Communications Act of 1934 empowered the FCC to "assign frequencies for each individual station," "determine the power which each station shall use," "[d]etermine the location of . . . individual stations," and "[h]ave authority to establish areas or zones to be served by any station." 47 U. S. C. §§ 303 (c), (d), and (h). Pursuant to these powers and others granted it by the Communications Act, the FCC has supervised the establishment and maintenance of

cast covers one market or geographic area are, under *Fortnightly*, estopped from saying that one who through CATV reaches by cable remote hidden valleys in that area, infringes the broadcaster's copyright. But the CATV's in the present cases go hundreds of miles, erect receiving stations or towers that pick up the programs of distant broadcasters, and carry them by cable into a wholly different area.

In any realistic practical sense the importation of these remote programs into the new and different market is performing a broadcast function by the cable device. Respondents in No. 72–1628 exercised their copyright privileges and licensed performance of their works to particular broadcasters for telecast in the distant market. Petitioners in that case (hereafter petitioners) were not among those licensees. Yet they are granted use of the copyrighted material without payment of any fees.

The Copyright Act, 17 U. S. C. §§ 1 (c) and (d), gives the owner of a copyright "the exclusive right" to present the creation "in public for profit" and to control the manner or method by which it is "reproduced." A CATV that builds an antenna to pick up telecasts in Area B and then transmits it by cable to Area A is *reproducing* the copyrighted work, not pursuant to a license from the owner of the copyright, but by theft. That is not "'"encouragement to the production of literary [or artistic] works of lasting benefit to the world"'" that we extolled in *Mazer* v. *Stein*, 347 U. S. 201, 219. Today's decision is at war with what Mr. Chief Justice Hughes, speaking for the Court in *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 130, described as the aim of Congress:

> "Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his

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a nationwide system of local radio and television broadcasting stations, each with primary responsibility to a particular community.

> own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants and not from any direct interest which the Government has in the use of the property which is the subject of the grants."

The CATV system involved in the present cases performs somewhat like a network-affiliated broadcast station which imports network programs originated in distant telecast centers by microwave, off-the-air cable, precisely as petitioners do here.[2] Petitioners in picking up these distant signals are not managing a simple antenna reception service. They go hundreds of miles from the community they desire to serve, erect a receiving station and then select the programs from TV and radio stations in that distant area which they desire to distribute in their own distant market. If "function" is the key test as *Fortnightly* says, then functionally speaking petitioners are broadcasters; and their acts of piracy are flagrant violations of the Copyright Act. The original broadcaster is the licensor of his copyright and it is by virtue of that license that, say, a Los Angeles station is enabled lawfully to make its broadcasts. Petitioners receive today a license-free importation of programs from the Los Angeles market into Farmington, New Mexico, a distant second market. Petitioners not only rebroadcast the pirated copyrighted programs, they themselves—unlike those in *Fortnightly*—originate programs and finance their original programs[3] and their pirated programs by

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[2] Farmington, New Mexico, into which petitioners pipe programs stolen from Los Angeles, is 600 miles away; and petitioners developed an intricate hookup "*via* twenty-three steps over a roundabout, 1300-mile route to [establish the link]." See 355 F. Supp. 618, 622.

[3] 476 F. 2d 338, 346–347; *CATV—First Report and Order*, 20 F. C. C. 2d 201; *United States* v. *Midwest Video Corp.*, 406 U. S.

sales of time to advertisers. That is the way the owner of these copyrighted programs receives value for his copyrights. CATV does the same thing; but it makes its fortune through advertising rates based in part upon pirated copyrighted programs. The Court says this is "a fact of no direct concern under the Copyright Act"; but the statement is itself the refutation of its truth. Rechanneling by CATV of the pirated programs robs the copyright owner of his chance for monetary rewards through advertising rates [4] on rebroadcasts in the distant area and gives those monetary rewards to the group that has pirated the program.

We are advised by an *amicus* brief of the Motion Picture Association that films from TV telecasts are being imported by CATV into their own markets in competition with the same pictures licensed to TV stations in the area into which the CATV—a nonpaying pirate of the films—imports them. It would be difficult to imagine a more flagrant violation of the Copyright Act. Since the Copyright Act is our only guide to law and justice in this case, it is difficult to see why CATV systems are free of copyright license fees, when they import programs from distant stations and transmit them to their paying customers in a distant market. That result reads the Copyright Act out of existence for CATV. That may or may not be desirable public policy. But it is a legislative decision that not even a rampant judicial activism should entertain.

There is nothing in the Communications Act that qualifies, limits, modifies, or makes exception to the Copy-

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649. See also *Cable Television Report and Order*, 36 F. C. C. 2d 143, 148, 290; *Rules re Micro-wave Served CATV*, 38 F. C. C. 683; *Radio Signals, Importation by Cable Television*, 36 F. C. C. 2d 630.

[4] We sustained the Commission's authority to require CATV to originate programs in a 5–4 decision in 1972. *United States* v. *Midwest Video Corp., supra.*

right Act. "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but provisions of this chapter are in addition to such remedies." 47 U. S. C. § 414. Moreover, the Federal Communications Commission has realized that it can "neither resolve, nor avoid" the problem under the Copyright Act, when it comes to CATV.[5]

On January 14, 1974, the Cabinet Committee on Cable Communications headed by Clay T. Whitehead made its Report to the President. That Report emphasizes the need for the free flow of information in a society that honors "freedom of expression"; and it emphasizes that CATV is a means to that end and that CATV is so closely "linked to . . . electronic data processing, telephone, television and radio broadcasting, the motion picture and music industries, and communications satellites," *id.*, at 14, as to require "a consistent and coherent national policy." *Ibid.* The Report rejects the regulatory framework of the Federal Communications Commission because it creates "the constant danger of unwarranted governmental influence or control over what people see and hear on television broadcast programming," *id.*, at 20. The Report opts for a limitation of "the number of channels over which the cable operator has control of

[5] The Solicitor General in his memorandum in the *Fortnightly* case urged that the cable transmission of other stations' programs into distant markets be subject to copyright protection:

"[M]uch of the advertising which accompanies the performance of copyrighted works, such as motion pictures, is directed solely at potential viewers who are within the station's normal service area—'local' advertising and 'national spot' advertising both fall within that category. Such advertisers do not necessarily derive any significant commercial benefit from CATV carriage of the sponsored programs outside of the market ordinarily served by the particular station, and accordingly may be unwilling to pay additional amounts for such expanded coverage." Memorandum for the United States as *amicus curiae* in No. 618, O. T. 1967, p. 10.

program content and to require that the bulk of channels be leased to others." *Ibid.*

The Report recognizes that "copyright liability" is an important phase of the new regulatory program the Committee envisages, *id.*, at 39. The pirating of programs sanctioned by today's decision is anathema to the philosophy of this Report:

> "Both equity and the incentives necessary for the free and competitive supply of programs require a system in which program retailers using cable channels negotiate and pay for the right to use programs and other copyrighted information. Individual or industry-wide negotiations for a license, or right, to use copyrighted material are the rule in all the other media and should be the rule in the cable industry.
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> "As a matter of communications policy, rather than copyright policy, the program retailer who distributes television broadcast signals in addition to those provided by the cable operator should be subject to full copyright liability for such retransmissions. However, given the reasonable expectations created by current regulatory policy, the cable operator should be entitled to a non-negotiated, blanket license, conferred by statute, to cover his own retransmission of broadcast signals." *Ibid.*

The Whitehead Commission Report has of course no technical, legal bearing on the issue before us. But it strongly indicates how important to legislation is the sanctity of the copyright and how opposed to ethical business systems is the pirating of copyrighted materials. The Court can reach the result it achieves today only by "legislating" important features of the Copyright Act out of existence. As stated by THE CHIEF JUSTICE in *United States* v. *Midwest Video Corp.*, 406 U. S. 649, 676,

"[t]he almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."

That counsel means that if we do not override *Fortnightly*, we should limit it to its precise facts and leave any extension or modification to the Congress.

Syllabus

GRANNY GOOSE FOODS, INC., ET AL. *v.* BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL NO. 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1566. Argued January 8, 1974—
Decided March 4, 1974

Petitioner employers brought suit in California state court alleging that respondent Union was engaging in a strike in breach of collective-bargaining agreements. The court issued a temporary restraining order on May 18, 1970. Two days later the case was removed to federal court, and on June 4 the District Court denied the Union's motion to dissolve the restraining order. Strike activity then stopped and the labor dispute remained dormant until the Union, after the petitioners had refused to bargain, resumed its strike on November 30, 1970. Two days later the District Court, on petitioners' motion, held the Union in criminal contempt for violating the restraining order. The Court of Appeals reversed on the ground that the order had expired long before November 30, 1970, reasoning that under both state law and Fed. Rule Civ. Proc. 65 (b) the order expired no later than June 7, 1970, 20 days after its issuance, and rejecting petitioners' contention that the life of the order was indefinitely prolonged by 28 U. S. C. § 1450 "until dissolved or modified by the district court." *Held:*

1. Whether state law or Rule 65 (b) is controlling, the restraining order expired long before the date of the alleged contempt, since under the State Code of Civil Procedure a temporary restraining order is returnable no later than 15 days from its date, 20 days if good cause is shown, and must be dissolved unless the party obtaining it proceeds to submit its case for a preliminary injunction, and similarly, under Rule 65 (b), such an order must expire by its own terms within 10 days after entry, 20 days if good cause is shown. Pp. 431–433.

2. Section 1450 was not intended to give state court injunctions greater effect after removal to federal court than they would have had if the case had remained in state court, and it should be construed in a manner consistent with the time limitations of Rule 65 (b). Pp. 434–440.

(a) Once a case has been removed to federal court, federal law, including the Federal Rules of Civil Procedure, controls the future course of proceedings, notwithstanding state court orders issued prior to removal. The underlying purpose of § 1450 (to ensure that no lapse in a state court temporary restraining order will occur simply by removing the case to federal court) and the policies reflected in the time limitations of Rule 65 (b) (stringent restrictions on the availability of *ex parte* restraining orders) can be accommodated by applying the rule that such a state court pre-removal order remains in force after removal no longer than it would have remained in effect under state law, but in no event longer than the Rule 65 (b) time limitations, measured from the date of removal. Pp. 435–440.

(b) Accordingly, the order expired by its terms on May 30, 1970, under the 10-day limitation of Rule 65 (b) applied from the date of removal; hence no order was in effect on November 30, 1970, and the Union violated no order when it resumed its strike at that time. P. 440.

3. The District Court's denial of the Union's motion to dissolve the restraining order did not effectively convert the order into a preliminary injunction of unlimited duration. Pp. 440–445.

(a) That the Union may have had the opportunity to be heard on the merits of the preliminary injunction when it moved to dissolve the restraining order is not the controlling factor, since under Rule 65 (b) the burden was on petitioners to show that they were entitled to a preliminary injunction, not on the Union to show that they were not. Pp. 442–443.

(b) Where a court intends to supplant a temporary restraining order, which under Rule 65 (b) expires by its own terms within 10 days of issuance, with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so, and where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within Rule 65 (b)'s time limits. Here, since the only orders entered were a temporary restraining order and an order denying a motion to dissolve the temporary order, the Union had

no reason to believe that a preliminary injunction of unlimited duration had been issued. Pp. 443–445.

472 F. 2d 764, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and BLACKMUN, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and STEWART and POWELL, JJ., joined, *post*, p. 445.

George J. Tichy II argued the cause for petitioners. With him on the briefs was *Wesley J. Fastiff*.

Duane B. Beeson argued the cause for respondent. With him on the brief were *Victor J. Van Bourg* and *Bernard Dunau*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case concerns the interpretation of 28 U. S. C. § 1450,[1] which provides in pertinent part: "Whenever any action is removed from a State court to a district court of the United States . . . [a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." The District Court held respondent Union in criminal contempt for

[1] Title 28 U. S. C. § 1450:

"Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

"All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

"All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

violating a temporary restraining order issued by the California Superior Court on May 18, 1970, prior to the removal of the case from the Superior Court to the District Court. The Court of Appeals reversed, one judge dissenting, on the ground that the temporary restraining order had expired long before November 30, 1970, the date of the alleged contempt. 472 F. 2d 764 (CA9 1973). The court reasoned that under both § 527 of the California Code of Civil Procedure and Fed. Rule Civ. Proc. 65 (b), the temporary restraining order must have expired no later than June 7, 1970, 20 days after its issuance. The court rejected petitioners' contention that the life of the order was indefinitely prolonged by § 1450 "until dissolved or modified by the district court," holding that the purpose of that statute "is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted," 472 F. 2d, at 767, not to "create a special breed of temporary restraining orders that survive beyond the life span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court." *Id.*, at 766.

As this understanding of the statute was in conflict with decisions of two other Circuits interpreting § 1450 to preclude the automatic termination of state court temporary restraining orders,[2] we granted certiorari. 414 U. S. 816 (1973). Finding ourselves in substantial agreement with the analysis of the Ninth Circuit in the present case, we affirm.

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[2] See *Appalachian Volunteers, Inc.* v. *Clark*, 432 F. 2d 530 (CA6 1970), cert. denied, 401 U. S. 939 (1971); *Morning Telegraph* v. *Powers*, 450 F. 2d 97 (CA2 1971), cert. denied, 405 U. S. 954 (1972). See also *The Herald Co.* v. *Hopkins*, 325 F. Supp. 1232 (NDNY 1971); *Peabody Coal Co.* v. *Barnes*, 308 F. Supp. 902 (ED Mo. 1969).

I

On May 15, 1970, petitioners Granny Goose Foods, Inc., and Sunshine Biscuits, Inc., filed a complaint in the Superior Court of California for the county of Alameda alleging that respondent, a local Teamsters Union, and its officers and agents, were engaging in strike activity in breach of national and local collective-bargaining agreements recently negotiated by multiunion-multiemployer bargaining teams. Although the exact nature of the underlying labor dispute is unclear, its basic contours are as follows: The Union was unwilling to comply with certain changes introduced in the new contracts; it believed it was not legally bound by the new agreements because it had not been a part of the multiunion bargaining units that negotiated the contracts; [3] and it

[3] This dispute was also the subject of a proceeding before the National Labor Relations Board. See *Airco Industrial Gases*, 195 N. L. R. B. 676 (1972). From the findings of fact in that proceeding, it appears that since 1964 it has been the practice in the trucking industry for representatives of a group of the various Teamsters locals and a group of various trucking employers to negotiate national agreements and supplemental agreements covering local areas. Agreements covering the 1967–1970 period had expired on March 31, 1970. Negotiations between the negotiating committees of the multiunion and multiemployer groups toward a contract for the 1970–1973 period began in January 1970 and continued in February and April. On April 29, the Teamsters negotiating committee approved the national and various supplemental agreements and on April 30, two representatives from each of the Teamsters locals in the multiunion group approved the agreements. Some time thereafter a nationwide referendum vote of all Teamsters members was conducted and it was determined that the employees had ratified the agreements.

The Union claimed it was not bound by the new agreements because it had made a timely withdrawal from the multiunion-multiemployer bargaining unit in a letter of January 28, 1970, to various employers, informing them of the Union's intention to negotiate a separate agreement from the national and supplemental

wanted to negotiate separate contracts with petitioner employers.

The same day the complaint was filed, the Superior Court issued a temporary restraining order enjoining all existing strike activity and ordering the defendants to show cause on May 26, 1970, why a preliminary injunction should not issue during the pendency of the suit. An amended complaint adding petitioner Standard Brands, Inc., was filed on May 18, and a modified temporary restraining order was issued that same day adding a prohibition against strike activities directed toward that employer.

On May 19, 1970, after having been served with the May 15 restraining order but before the scheduled hearing on the order to show cause, the Union and the individual defendants removed the proceeding to the District Court on the ground that the action arose under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185.[4] On May 20, 1970, an amended removal petition was filed to take into account the modified temporary restraining order of May 18.

Simultaneously with the filing of the removal petition, the defendants filed a motion in the District Court to dissolve the temporary restraining order. The sole ground alleged in support of the motion was that the District Court lacked jurisdiction to maintain the restraining order under this Court's decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962), where

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agreement. The Board ultimately determined that the Union's withdrawal was not timely because negotiations had begun on January 7, 1970, prior to the attempted withdrawal. We, of course, express no view on this issue.

[4] In *Avco Corp.* v. *Aero Lodge No. 735*, 390 U. S. 557 (1968), we held that § 301 (a) suits initially brought in state courts may be removed to the designated federal forum under the federal-question removal jurisdiction delineated in 28 U. S. C. § 1441.

the Court held that notwithstanding § 301's grant of jurisdiction to federal courts over suits between employers and unions for breach of collective-bargaining agreements, § 4 of the Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. § 104, barred federal courts from issuing an injunction against a strike allegedly in violation of a collective-bargaining agreement containing a no-strike clause.

The employers then filed a motion to remand the case to the Superior Court, alleging that the defendants had waived their right to removal by submitting to the jurisdiction of the state court. The Union's motion to dissolve and the employers' motion to remand came on for a hearing on May 27, 1970. The motion to remand was denied from the bench. With respect to the motion to dissolve, the employers brought to the attention of the District Court our grant of certiorari in *Boys Markets* v. *Retail Clerks Union*, 396 U. S. 1000 (1970), which was interpreted as an indication that the Court would re-examine its holding in *Sinclair*. As *Boys Markets* had been argued here in April 1970, the District Court refrained from taking any action on the motion to dissolve until it received further guidance from this Court. On June 1, 1970, we handed down our decision in *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, overruling *Sinclair* and holding that a district court could enjoin a strike in breach of a no-strike clause in a collective-bargaining agreement and order arbitration under the agreement. Three days later, on June 4, 1970, the District Court entered a brief order denying the motion to dissolve the state court temporary restraining order, citing *Boys Markets*.

Evidently picketing and strike activity stopped and the labor dispute remained dormant after June 4. The flame was rekindled, however, when on November 9,

1970, the Union sent the employers telegrams requesting bargaining to arrive at a collective-bargaining agreement and expressing the Union's continued belief that it was not bound by the national and local agreements negotiated by the multiunion-multiemployer groups. The employers answered that there was no need to bargain because, in their view, the Union was bound by the national and local agreements. The conflict remained unresolved, and on November 30, 1970, the Union commenced its strike activity once again.

The next day the employers moved the District Court to hold the Union, its agents, and officers in contempt of the modified temporary restraining order issued by the Superior Court on May 18. A hearing was held on the motion the following day. The Union's argument that the temporary restraining order had long since expired was rejected by the District Court on two grounds. First, the court concluded that its earlier action denying the motion to dissolve the temporary restraining order gave the order continuing force and effect. Second, the court found that § 1450 itself served to continue the restraining order in effect until affirmatively dissolved or modified by the court. Concluding after the hearing that the Union had willfully violated the restraining order, the District Court held it in criminal contempt and imposed a fine of $200,000.[5]

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[5] Three-fourths of the fine was conditioned on the Union's failure to end the strike within 24 hours of the court's order, one-half on failure to end the strike within 48 hours, and one-fourth on failure to end the strike within 72 hours.

Although we do not rest our decision on this point, there seems to be much evidence in the record suggesting that even if the restraining order remained in effect and had been violated, the violation was not willful. A finding that the violation was willful obviously presupposes knowledge on the part of the Union that the order was still in effect. Whether or not the order in fact

II

Leaving aside for the moment the question whether the order denying the motion to dissolve the temporary restraining order was effectively the grant of a preliminary injunction, it is clear that whether California law or Rule 65 (b) is controlling, the temporary restraining order issued by the Superior Court expired long before the date of the alleged contempt. Section 527 of the California Code of Civil Procedure,[6] under which the

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remained in effect on November 30, the Union evidently believed it had expired. Prior to commencing its strike in November, the Union informed the employers through its attorney that it did "not understand from the file that there is presently in effect any order which forbids Local 70 from bargaining with the employer, or from pressing its position that it has a right to bargain for a separate contract. A motion to dissolve a temporary restraining order against economic action was denied by the federal court, but that temporary restraining order has long since become ineffective by virtue of the statutory limitation on its duration, and there has been no application for a preliminary injunction.

"Accordingly, the federal court case is pending, but there are no outstanding orders which affect the assertion by Local 70 of rights which it claims. . . ." App. 67.

[6] Section 527 (Supp. 1974) provides:

"An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith.

"No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day

order was issued, provides that temporary restraining orders must be returnable no later than 15 days from the date of the order, 20 days if good cause is shown, and unless the party obtaining the order then proceeds to submit its case for a preliminary injunction, the temporary restraining order must be dissolved.[7] Simi-

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that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law."

[7] The time limitation of § 527 has been strictly construed by the California courts. See, *e. g.*, *Smith* v. *Superior Court*, 64 Cal. App. 722, 222 P. 857 (1923); *Sharpe* v. *Brotzman*, 145 Cal. App. 2d 354, 302 P. 2d 668 (1956); *Oksner* v. *Superior Court*, 229 Cal. App. 2d 672, 40 Cal. Rptr. 621 (1964); *Agricultural Prorate Comm'n* v. *Superior Court*, 30 Cal. App. 2d 154, 85 P. 2d 898 (1938).

Petitioners argue that the time limitation of § 527 is not applicable here because it is operative only with respect to orders

larly, under Rule 65 (b),[8] temporary restraining orders must expire by their own terms within 10 days after entry, 20 days if good cause is shown.

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granted without notice to the adverse party. In the present case, petitioners indicate, telephonic notice was given to the Union's counsel on May 15, the day the employers first sought the restraining order, counsel was served with all documents prior to a hearing arranged that day, and counsel was present in the courtroom and presented argument on behalf of the Union at that hearing.

We think it clear from § 527, however, that this kind of informal notice and hearing does not convert the temporary restraining order into a preliminary injunction of unlimited duration under state law. Section 527 provides that when a case comes up for a hearing on a preliminary injunction, the party seeking the injunction "must have served upon the opposite party *at least two days prior to such hearing*, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application . . . ." (Emphasis added.) In providing that no preliminary injunction shall be granted without notice to the opposite party, we think the statute thus contemplates notice of at least two days, with a meaningful opportunity to prepare for the hearing, rather than the kind of informal, same-day notice that was given in this case.

This interpretation of state law is supported on the facts of this case. Even though the Superior Court held some sort of hearing, with Union counsel attending, before granting the temporary restraining order, the court obviously felt that the hearing was not a sufficient basis for ruling on the preliminary injunction. Accordingly, in the same order granting the temporary restraining order, the court set the case for a hearing on the application for a preliminary injunction within the 15-day limit imposed by § 527.

In any event, we need not rest our holding on this interpretation of state law, for even if this restraining order could have had unlimited duration under California law, it was subject to the time limitations of Rule 65 (b) after the case was removed to federal court. See *infra*, at 437–440. Although by its terms Rule 65 (b), like § 527, only limits the duration of restraining orders issued without notice, we think it applicable to the order in this case even though informal notice was given. The 1966 Amendments to Rule 65 (b),

[*Footnote 8 is on p. 434*]

Petitioners argue, however, that notwithstanding the time limitations of state law, § 1450 keeps all state court injunctions, including *ex parte* temporary restraining

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requiring the party seeking a temporary restraining order to certify to the court in writing the efforts, if any, which have been made to give either written or oral notice to the adverse party or his attorney, were adopted in recognition of the fact that informal notice and a hastily arranged hearing are to be preferred to no notice or hearing at all. See Advisory Committee's Note, 28 U. S. C. App. 7831. But this informal, same-day notice, desirable though it may be before a restraining order is issued, is no substitute for the more thorough notice requirements which must be satisfied to obtain a preliminary injunction of potentially unlimited duration. The notice required by Rule 65 (a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition. *Sims* v. *Greene*, 161 F. 2d 87 (CA3 1947). The same-day notice provided in this case before the temporary restraining order was issued does not suffice. See *Bailey* v. *Transportation-Communication Employees Union*, 45 F. R. D. 444 (ND Miss. 1968). See also C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2949, p. 468 (1973 ed.), reading into Rule 65 (a) a five-day-notice requirement based on Fed. Rule Civ. Proc. 6 (d).

[8] Rule 65 (b) provides:

"(b) Temporary Restraining Order; Notice; Hearing; Duration.

"A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order,

orders, in full force and effect after removal until affirmatively dissolved or modified by the district court. To the extent this reading of § 1450 is inconsistent with the time limitations of Rule 65 (b), petitioners contend the statute must control.

In our view, however, § 1450 can and should be interpreted in a manner which fully serves its underlying purposes, yet at the same time places it in harmony with the important congressional policies reflected in the time limitations in Rule 65 (b).

At the outset, we can find no basis for petitioners' argument that § 1450 was intended to turn *ex parte* state court temporary restraining orders of limited duration into federal court injunctions of unlimited duration. Section 1450 was simply designed to deal with the unique problem of a shift in jurisdiction in the middle of a case which arises whenever cases are removed from state to federal court. In this respect two basic purposes are served. Judicial economy is promoted by providing that proceedings had in state court shall have force and effect in federal court, so that pleadings filed

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for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

in state court, for example, need not be duplicated in federal court.[9] In addition, the statute ensures that interlocutory orders entered by the state court to protect various rights of the parties will not lapse upon removal. Thus attachments, sequestrations, bonds, undertakings, securities, injunctions, and other orders obtained in state court all remain effective after the case is removed to federal court.

But while Congress clearly intended to preserve the effectiveness of state court orders after removal, there is no basis for believing that § 1450 was designed to give injunctions or other orders *greater* effect after removal to federal court than they would have had if the case had remained in state court. After removal, the federal court "takes the case up where the State court left it off." *Duncan* v. *Gegan*, 101 U. S. 810, 812 (1880). The "full force and effect" provided state court orders after removal of the case to federal court was not intended to be more than the force and effect the orders would have had in state court.[10]

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[9] See, *e. g.*, *Madron* v. *Thomas*, 38 F. R. D. 177 (ED Tenn. 1965); *Murphy* v. *E. I. du Pont de Nemours & Co.*, 26 F. Supp. 999 (WD Pa. 1939); *Borton* v. *Connecticut Gen. Lije Ins. Co.*, 25 F. Supp. 579 (Neb. 1938). Of course, repleading may be required by the district court in appropriate cases. See, *e. g.*, *Foust* v. *Baltimore & O. R. Co.*, 91 F. Supp. 817 (SD Ohio 1950); *Shell Petroleum Corp.* v. *Stueve*, 25 F. Supp. 879 (Minn. 1938).

[10] We note that § 1450 expressly provides that attachments or sequestrations effected by the state court prior to removal "shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court." Petitioners argue that since post-removal treatment of an attachment effected in the state court was expressly made dependent on the provisions of state law, while no such express provision was made with respect to injunctions issued by the state court prior to removal,

More importantly, once a case has been removed to federal court, it is settled that federal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal. Section 1450 implies as much by recognizing the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal. This Court resolved this issue long ago in *Ex parte Fisk*, 113 U. S. 713 (1885). There it was argued that an order to take the deposition of a witness issued by the state court prior to removal was binding in federal court and could not be reconsidered by the federal court, notwithstanding its inconsistency with certain federal statutes governing procedure in federal courts. The Court rejected this contention, and said that the predecessor of § 1450

> "declares orders of the State court, in a case afterwards removed, to be in force until dissolved or modified by the Circuit Court. This fully recognizes the power of the latter court over such orders. And it was not intended to enact that an order made

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Congress must have intended that injunction orders not be controlled after removal by the durational limitations of state law.

As we view the matter, the express provision in § 1450 that state law governs attachments after removal is simply an additional statement of long-settled federal law providing that in all cases in federal court, whether or not removed from state court, state law is incorporated to determine the availability of prejudgment remedies for the seizure of person or property to secure satisfaction of the judgment ultimately entered. See Fed. Rule Civ. Proc. 64. Section 1450 makes it clear that this settled rule of federal law applies to removed cases as well. If anything, therefore, it supports our conclusion that the other procedural requirements of federal law, including the time limitations of Rule 65 (b), must be applied to state court temporary restraining orders after the case has been removed to federal court. See *infra*, at 437–440.

> in the State court, which affected or might affect the mode of trial yet to be had, could change or modify the express directions of an act of Congress on that subject.
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> . . . . .
>
> "The petitioner having removed his case into the Circuit Court has a right to have its further progress governed by the law of the latter court, and not by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed." *Id.*, at 725–726.

See also *King* v. *Worthington*, 104 U. S. 44 (1881); *Freeman* v. *Bee Machine Co.*, 319 U. S. 448 (1943).

By the same token, respondent Union had a right to the protections of the time limitation in Rule 65 (b) once the case was removed to the District Court. The Federal Rules of Civil Procedure, like other provisions of federal law, govern the mode of proceedings in federal court after removal. See Fed. Rule Civ. Proc. 81 (c).[11] In addition, we may note that although the durational limitations imposed on *ex parte* restraining orders are now codified in a federal rule, they had their origin in § 17 of the Clayton Act of 1914, 38 Stat. 737. As the House Report recommending its enactment emphasized, the durational and other limitations imposed on temporary restraining orders were thought necessary to cure a serious problem of "ill-considered injunctions without notice."[12] The stringent restrictions imposed by § 17,

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[11] See generally Wright & Miller, *supra*, n. 7, § 1024, at 108–110, and cases there cited.

[12] See H. R. Rep. No. 627, 63d Cong., 2d Sess., 25 (1914).

and now by Rule 65,[13] on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, cf. *Carroll* v. *President and Comm'rs of Princess Anne,* 393 U. S. 175, 180 (1968), but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.[14]

We can find no indication that Congress intended § 1450 as an exception to its broader, longstanding policy of restricting the duration of *ex parte* restraining orders. The underlying purpose of § 1450—ensuring that no lapse in a state court temporary restraining order will occur simply by removing the case to federal court—and the policies reflected in Rule 65 (b) can easily be accommodated by applying the following rule: An *ex parte* temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force

[13] Section 17 of the Clayton Act was codified as 28 U. S. C. § 381 (1940 ed.), and was repealed by the Judicial Code Revision Act of 1948, 62 Stat. 997, for the stated reason that it was covered by Rule 65. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A236 (1947).

[14] See, *e. g., Pan American World Airways* v. *Flight Engineers' Assn.,* 306 F. 2d 840 (CA2 1962); *Smotherman* v. *United States,* 186 F. 2d 676 (CA10 1950); *Sims* v. *Greene,* 161 F. 2d 87 (CA3 1947). This basic purpose is implicit in Rule 65 (b)'s requirement that after a temporary restraining order is granted without notice, "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character . . . ."

longer than the time limitations imposed by Rule 65 (b), measured from the date of removal.[15]

Applying our holding to the present case is simple. The temporary restraining order was issued by the Superior Court on May 18, 1970, and would have remained in effect in the state court no longer than 15 days, or until June 2. The case was removed to federal court on May 20, 1970. The temporary restraining order therefore expired on May 30, 1970, applying the 10-day limitation of Rule 65 (b) from the date of removal. Accordingly, no order was in effect on November 30, 1970, and the Union violated no order when it resumed its strike at that time.

III

We now turn to petitioners' argument that, apart from the operation of § 1450, the District Court's denial of the Union's motion to dissolve the temporary restraining order effectively converted the order into a preliminary injunction of unlimited duration. The Court of Appeals rejected this argument out of hand, stating that "[t]he Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate." 472 F. 2d, at 767. We reach essentially the same conclusion.

[15] The following two illustrations should suffice to clarify this holding. Where the state court issues a temporary restraining order of 15 days' duration on Day 1 and the case is removed to federal court on Day 13, the order will expire on Day 15 in federal court just as it would have expired on Day 15 in state court. Where, however, a state court issues a temporary restraining order of 15 days' duration on Day 1 and the case is removed to the federal court on Day 2, the restraining order will expire on Day 12, applying the 10-day time limitation of Rule 65 (b) measured from the date of removal. Of course, in either case, the district court could extend the restraining order for up to an additional 10 days, for good cause shown, under Rule 65 (b).

As indicated earlier, once a case has been removed to federal court, its course is to be governed by federal law, including the Federal Rules of Civil Procedure. Rule 65 (b) establishes a procedure whereby the party against whom a temporary restraining order has issued can move to dissolve or modify the injunction, upon short notice to the party who obtained the order. Situations may arise where the parties, at the time of the hearing on the motion to dissolve the restraining order, find themselves in a position to present their evidence and legal arguments for or against a preliminary injunction. In such circumstances, of course, the court can proceed with the hearing as if it were a hearing on an application for a preliminary injunction. At such hearing, as in any other hearing in which a preliminary injunction is sought, the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied and its likelihood of success on the merits.[16]

On the other hand, situations might arise where the parties are not prepared and do not intend at the hearing on the motion to dissolve or modify the temporary restraining order to present their cases for or against a preliminary injunction. In such circumstances, the appropriate procedure would be for the district court to deal with the issues raised in the motion to dissolve or modify the restraining order, but to postpone for a later hearing, still within the time limitations of Rule 65 (b), the application for a preliminary injunction. See generally C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2954, p. 523 (1973 ed.).

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[16] See, *e. g.*, *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange*, 466 F. 2d 743 (CA2 1972); *Crowther* v. *Seaborg*, 415 F. 2d 437 (CA10 1969); *Garlock, Inc.* v. *United Seal, Inc.*, 404 F. 2d 256 (CA6 1968).

In the present case we think it plain that the hearing on the Union's motion to dissolve the restraining order cannot be considered to be a hearing on a preliminary injunction, and that the District Court's order denying the motion to dissolve cannot reasonably be construed as the grant of a preliminary injunction. There is no indication in the record that either party or the District Court itself treated the May 27 hearing as a hearing on an application for a preliminary injunction. The employers made no attempt at that time to present their case for a preliminary injunction. Likewise, the Union made no attempt at that time to present its defense that it was not bound by the new national and local agreements because it had made a timely withdrawal from the multiunion bargaining unit negotiating said contracts. See n. 3, *supra*. The court itself did not indicate that it was undertaking a hearing on a preliminary injunction. As far as we can tell, it never addressed itself at the hearing to the various equitable factors involved in considering a preliminary injunction, but only considered the employers' argument that the case should be remanded to the state court because the right to remove had been waived by the Union's appearing in the state proceeding and the Union's argument that the temporary restraining order should be dissolved for want of jurisdiction under the *Sinclair* holding.

We cannot accept petitioners' argument that the controlling factor is that the Union had the *opportunity* to be heard on the merits of the preliminary injunction when it moved in the District Court to dissolve the temporary restraining order. Rule 65 (b) does not place upon the party against whom a temporary restraining order has issued the burden of coming forward and presenting its case against a preliminary injunction. To the contrary, the Rule provides that "[i]n case a tempo-

rary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time . . . and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order." The burden was on the employers to show that they were entitled to a preliminary injunction, not on the Union to show that they were not.

Even were we to assume that the District Court had intended by its June 4 order to grant a preliminary injunction, its intention was not manifested in an appropriate form. Where a hearing on a preliminary injunction has been held after issuance of a temporary restraining order, and where the District Court decides to grant the preliminary injunction, the appropriate procedure is not simply to continue in effect the temporary restraining order, but rather to issue a preliminary injunction, accompanied by the necessary findings of fact and conclusions of law.[17] As stated by the Second Circuit:

> "The fact that notice is given and a hearing held cannot serve to extend indefinitely beyond the period limited by [Rule 65 (b)] the time during which a temporary restraining order remains effective. The [Rule] contemplates that notice and hearing shall result in an appropriate adjudication,

[17] Fed. Rule Civ. Proc. 52 (a) provides that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." Where a temporary restraining order has been continued beyond the time limits permitted under Rule 65 (b), and where the required findings of fact and conclusions of law have not been set forth, the order is invalid. See, *e. g., National Mediation Bd.* v. *Air Line Pilots Assn.*, 116 U. S. App. D. C. 300, 323 F. 2d 305 (1963); *Sims* v. *Greene*, 160 F. 2d 512 (CA3 1947).

> i. e., the issuance or denial of a preliminary injunction, not in extension of the temporary stay." *Pan American World Airways* v. *Flight Engineers' Assn.*, 306 F. 2d 840, 842 (1962) (footnotes omitted).

See also *Sims* v. *Greene*, 160 F. 2d 512 (CA3 1947).

As the fine imposed in this case exemplifies, serious penalties can befall those who are found to be in contempt of court injunctions. Accordingly, one basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits.[18]

> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. . . . The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76 (1967).

It would be inconsistent with this basic principle to countenance procedures whereby parties against whom an injunction is directed are left to guess about its intended duration. Rule 65 (b) provides that temporary restraining orders expire by their own terms within 10 days of their issuance. Where a court intends to supplant such an order with a prelimi-

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[18] Rule 65 (d) provides:

"Every order granting an injunction and every restraining order . . . shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ."

nary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. And where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65 (b). Here, since the only orders entered were a temporary restraining order of limited duration and an order denying a motion to dissolve the temporary order, the Union had no reason to believe that a preliminary injunction of unlimited duration had been issued.

Since neither § 1450 nor the District Court's denial of the Union's motion to dissolve the temporary restraining order effectively converted that order into a preliminary injunction, no order was in effect on November 30, 1970, over six months after the temporary restraining order was issued.[19] There being no order to violate, the District Court erred in holding the Union in contempt, and the judgment of the Court of Appeals reversing the District Court's adjudication of contempt must be

Affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, concurring in the judgment.

I agree with the Court that the judgment of the Court of Appeals for the Ninth Circuit in this case should be affirmed, since there was no injunctive order in effect at the time that respondent's allegedly contemptuous conduct occurred. But I do not join that portion of the Court's opinion which lays down a "rule" for all cases

[19] In view of our disposition of the case, we need not and do not reach respondent's argument that notwithstanding *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970), the temporary restraining order issued in this case should be governed by the 5-day limit of § 7 of the Norris-La Guardia Act, 29 U. S. C. § 107.

involving 28 U. S. C. § 1450,[1] the statute which all parties agree is controlling in the case before us. In my view, the announcement of this "rule" is neither necessary to the decision of this case nor consistent with the provisions of the statute itself.

The Court persuasively demonstrates in its opinion that the temporary restraining order issued by the California Superior Court had expired by its own terms long before the alleged contempt occurred. And I see nothing in the language or legislative history of 28 U. S. C. § 1450, providing that "[a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court," which would indefinitely extend the Superior Court's restraining order beyond the time of its normal expiration under state law. Since the temporary restraining order, had the case remained in state court, concededly would have expired in early June, respondent's actions in November and December could not have constituted a contempt of that order.

The Court also persuasively demonstrates that none of the proceedings occurring after removal of the case to the United States District Court had the effect of converting the subsisting state court temporary restraining order into a preliminary injunction of indefinite duration. Those proceedings addressed markedly different issues and certainly did not give the state court order a new, independent federal existence.

Having said this much, the Court has disposed of the case before it. The opinion then goes on, however, to devise a "rule" that

"[a]n *ex parte* temporary restraining order issued by

[1] The relevant provision of 28 U. S. C. § 1450 reads:

"All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

> a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65 (b), measured from the date of removal." *Ante,* at 439–440. (Footnote omitted.)

But the determination that mere removal of a case to a federal district court does not extend the duration of a previously issued state court order past its original termination date makes quite unnecessary to this case any further discussion about time limitations contained in Fed. Rule Civ. Proc. 65 (b). More importantly, the second clause of the "rule" devised by the Court seems quite contrary to the specific language of 28 U. S. C. § 1450.

The Court apparently bases this latter clause of the "rule" upon the observation that "respondent Union had a right to the protections of the time limitation in Rule 65 (b) once the case was removed to the District Court." While this premise probably has a good deal to recommend it as a matter of practicality or of common sense, the language of the statute gives no hint that rules of practice governing issuance of federal injunctions in the first instance were automatically to be incorporated in applying its terms. The statute says that the state court's temporary restraining order "shall remain in full force and effect until dissolved or modified by the district court." This Court's "rule," however, says that it shall *not* remain in full force and effect, even though not dissolved or modified by the District Court, if it would have a life beyond the time limitations imposed by Rule 65 (b).

I think it likely that the interest in limiting the duration of temporary restraining orders which is exemplified in Rule 65 (b) can be fully protected in cases removed

to the district court by an application to modify or dissolve a state court restraining order which is incompatible with those terms.[2] Such a procedure would be quite consistent with § 1450, which specifically contemplates dissolution or modification by the district court upon an appropriate showing, in a way that the "rule" devised by the Court in this case is not. It is unlikely that many orders issued under rules of state procedure, primarily designed, after all, to provide suitable procedures for state courts rather than to frustrate federal procedural rules in removed actions, would by their terms remain in effect for a period of time far longer than that contemplated by the comparable Federal Rule of Civil Procedure. But in the rare case where such a condition obtains, it is surely not asking too much of a litigant in a removed case to comply with § 1450 and affirmatively move for appropriate modification of the state order.

Therefore, although I cannot subscribe to the rule which the Court fashions to govern cases of this type, I concur in its conclusion that respondent's activity in November and December 1970 did not violate any injunctive order which was in force at that time.[3]

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[2] Indeed, respondent's motion to dissolve the state court order because of the prohibitions contained in the Norris-LaGuardia Act, 29 U. S. C. § 104, was just such a motion. That motion was denied by the District Court, however, and respondent made no further effort to obtain a modification or dissolution of the state restraining order prior to its expiration.

[3] I see no occasion for the Court's rather casual speculation, contained in n. 5 of its opinion, that the respondent's violation of the order, even were it effective at the time of its later conduct, may not have been "willful." The Court has concluded that the order was *not effective* at that later time, and it can serve no useful purpose to speculate about the sufficiency of the evidence with respect to violation of a defunct order.

DeMARCO *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73–5684. Decided March 18, 1974

A Government witness, who had been indicted with petitioner, testified at petitioner's trial that no promises had been made to the witness regarding disposition of his case. Petitioner, for the first time on appeal of his conviction, contended that the witness' testimony was false on the basis of the prosecutor's statements at the subsequent sentencing hearing of the witness, who had pleaded guilty to a lesser charge in a superseding indictment. The Court of Appeals, after examining the transcript of the sentencing hearing, concluded that no leniency promise had been made prior to the witness' testimony at petitioner's trial. *Held:* Had there been a promise to the witness before he testified, a reversal of petitioner's conviction would be required, *Giglio* v. *United States,* 405 U. S. 150, and *Napue* v. *Illinois,* 360 U. S. 264, and the factual issue of whether the plea bargain that obviously was made with the witness preceded or followed petitioner's trial should have been resolved by the District Court after an evidentiary hearing.
Certiorari granted; vacated and remanded.

PER CURIAM.

At petitioner's trial, a Government witness who had been indicted with petitioner, testified that the Government had made no promises to him with respect to the disposition of his case. Petitioner was convicted and he appealed. Meanwhile, the witness had pleaded guilty to a lesser charge contained in a superseding indictment; and at the witness' sentencing hearing, the United States Attorney made certain statements that petitioner interpreted as proving that promises had been made to the witness prior to his testimony and that the witness had testified falsely at petitioner's trial. Without presenting the matter to the District Court, petitioner pressed the ques-

tion in the Court of Appeals. That court accepted the tendered issue, examined the transcript of the hearing at which the witness was sentenced, considered the Government's response in the Court of Appeals and, although the prosecutor's remarks were deemed ambiguous and the question thought to be a "close" one, concluded that no promises had been made to the witness prior to the witness' testimony at petitioner's trial.

Unquestionably, had there been a promise to the witness prior to his testimony, *Giglio* v. *United States,* 405 U. S. 150 (1972), and *Napue* v. *Illinois,* 360 U. S. 264 (1959), would require reversal of petitioner's conviction. It is also clear that there was a plea bargain between the witness and the Government at some point, the question being whether it was made after or before petitioner's trial. This factual issue was dispositive of the case, and it would have been better practice not to resolve it in the Court of Appeals based only on the materials then before the court. The issue should have been remanded for initial disposition in the District Court after an evidentiary hearing.* We therefore grant the petition for certiorari and the motion to proceed *in forma pauperis,* vacate the judgment of the Court of Appeals, and remand the case to that court with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

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*The Government's response to the petition for certiorari agrees that factfinding is the basic responsibility of district courts, rather than appellate courts, and that the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court. See, *e. g., General Electric Credit Corp.* v. *Robbins,* 414 F. 2d 208, 211 (CA8 1969); *Yanish* v. *Barber,* 232 F. 2d 939, 946–947 (CA9 1956). See also 5A J. Moore, Federal Practice ¶ 52.06 [2] n. 1 (2d ed. 1974).

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

Petitioner was convicted in the District Court of trafficking in illegal narcotics in violation of the provisions of 21 U. S. C. § 174 (1964 ed.). The Court of Appeals summarily rejected petitioner's attacks on the sufficiency of the evidence to convict him, and dealt in detail only with the *Giglio* issue upon which this Court decides to vacate and remand for consideration by the District Court. As the Court notes, this was a "factual issue," *ante,* at 450, and raises no question whatever of general importance in the law. Commonly I would expect this petition to be denied for those reasons.

The Solicitor General, however, has filed a response in this Court which, though entitled "Memorandum in Opposition," incorporates in a footnote a backhanded invitation to the Court to follow the course which it has now taken. It is well established that this Court does not, or at least should not, respond in Pavlovian fashion to confessions of error by the Solicitor General. See, *e. g., Young* v. *United States,* 315 U. S. 257 (1942); *Gibson* v. *United States,* 329 U. S. 338, 344 n. 9 (1946). I believe there could not be a plainer case than this one for the invocation of the doctrine of invited error. For whatever may be the proper allocation of factfinding responsibilities between the Court of Appeals and the District Court, petitioner deliberately chose to raise this largely factual issue for the first time in the Court of Appeals and to seek decision upon it there. That the Court of Appeals responded to the invitation is scarcely grounds for any claim of error here. I would deny certiorari.

STEFFEL *v.* THOMPSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72–5581. Argued November 13, 1973—Decided March 19, 1974

Petitioner, who had twice been warned to stop handbilling on an exterior sidewalk of a shopping center against American involvement in Vietnam and threatened with arrest by police if he failed to do so, and whose companion continued handbilling and was charged with violating the Georgia criminal trespass law, brought an action for injunctive and declaratory relief in the District Court, claiming that application to him of that law would violate his First and Fourteenth Amendment rights. The District Court dismissed the action, finding that "no meaningful contention can be made that the state has [acted] or will . . . act in bad faith," and therefore "the rudiments of an active controversy between the parties . . . [are] lacking." The Court of Appeals affirmed, being of the view that *Younger* v. *Harris*, 401 U. S. 37, made it clear that irreparable injury must be measured by bad-faith harassment and such a test must be applied to a request for injunctive relief against *threatened*, as well as pending, state court criminal prosecution; and that it followed from the reasoning of *Samuels* v. *Mackell*, 401 U. S. 66, that the same test of bad-faith harassment is a prerequisite for declaratory relief with respect to a threatened prosecution. *Held:*

1. This case presents an "actual controversy" under Art. III of the Constitution and the Federal Declaratory Judgment Act, the alleged threats of prosecution in the circumstances alleged not being "imaginary or speculative" and it being unnecessary for petitioner to expose himself to actual arrest or prosecution to make his constitutional challenge. Whether the controversy remains substantial and continuing in the light of the effect of the recent reduction of the Nation's involvement in Vietnam on petitioner's desire to engage in the handbilling at the shopping center must be resolved by the District Court on remand. Pp. 458–460.

2. Federal declaratory relief is not precluded when a prosecution based upon an assertedly unconstitutional state statute has been threatened, but is not pending, even if a showing of bad-faith

enforcement or other special circumstances has not been made. Pp. 460–473.

(a) When no state criminal proceeding is pending at the time the federal complaint is filed, considerations of equity, comity, and federalism on which *Younger* v. *Harris*, and *Samuels* v. *Mackell*, both *supra*, were based, have little vitality: federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles. Pp. 460–462.

(b) Even if the Court of Appeals correctly viewed injunctive relief as inappropriate (a question not reached here, petitioner having abandoned his request for that remedy), the court erred in treating the requests for injunctive and declaratory relief as a single issue and in holding that a failure to demonstrate irreparable injury precluded the granting of declaratory relief. Congress plainly intended that a declaratory judgment be available as a milder alternative than the injunction to test the constitutionality of state criminal statutes. Pp. 462–473.

3. In determining whether it is appropriate to grant declaratory relief when no state criminal proceeding is pending, it is immaterial whether the attack is made on the constitutionality of a state criminal statute on its face or as applied. *Cameron* v. *Johnson*, 390 U. S. 611, distinguished. Pp. 473–475.

459 F. 2d 919, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. STEWART, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 475. WHITE, J., filed a concurring opinion, *post*, p. 476. REHNQUIST, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 478.

Howard Moore, Jr., argued the cause for petitioner. With him on the brief were *Elizabeth R. Rindskopf* and *William R. Gignilliat III*.

Lawrence M. Cohen argued the cause for respondents. With him on the brief for respondents Hudgens et al. was *Dock H. Davis*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), held, respectively, that, unless bad-faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. This case presents the important question reserved in *Samuels* v. *Mackell*, *id.*, at 73–74, whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending, and a showing of bad-faith enforcement or other special circumstances has not been made.

Petitioner, and others, filed a complaint in the District Court for the Northern District of Georgia, invoking the Civil Rights Act of 1871, 42 U. S. C. § 1983, and its jurisdictional implementation, 28 U. S. C. § 1343. The complaint requested a declaratory judgment pursuant to 28 U. S. C. §§ 2201–2202, that Ga. Code Ann. § 26–1503 (1972) [1] was being applied in violation of petitioner's

[1] This statute provides:

"(a) A person commits criminal trespass when he intentionally damages any property of another without his consent and the damage thereto is $100 or less, or knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

"(b) A person commits criminal trespass when he knowingly and without authority:

"(1) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, for an unlawful purpose; or

First and Fourteenth Amendment rights, and an injunction restraining respondents—the solicitor of the Civil and Criminal Court of DeKalb County, the chief of the DeKalb County Police, the owner of the North DeKalb Shopping Center, and the manager of that shopping center—from enforcing the statute so as to interfere with petitioner's constitutionally protected activities.

The parties stipulated to the relevant facts: On October 8, 1970, while petitioner and other individuals were distributing handbills protesting American involvement in Vietnam on an exterior sidewalk of the North DeKalb Shopping Center, shopping center employees asked them to stop handbilling and leave.[2] They declined to do so, and police officers were summoned. The officers told them that they would be arrested if they did not stop handbilling. The group then left to avoid arrest. Two days later petitioner and a companion returned to the shopping center and again began handbilling. The manager of the center called the police, and petitioner and his companion were once again told that failure to stop their handbilling would result in their arrests. Petitioner left to avoid arrest. His companion stayed, however, con-

"(2) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

"(3) Remains upon the land or premises of another person, or within the vehicle, railroad car, aircraft, or watercraft of another person, after receiving notice from the owner or rightful occupant to depart.

"(c) A person convicted of criminal trespass shall be punished as for a misdemeanor."

[2] At a hearing in the District Court, petitioner testified that on another occasion, prior to June 1970, he had also been threatened with arrest for handbilling at the shopping center. At that time, the police had shown him the statute they intended to enforce, presumably § 26–1503. R. 140–141.

tinued handbilling, and was arrested and subsequently arraigned on a charge of criminal trespass in violation of § 26–1503.[3] Petitioner alleged in his complaint that, although he desired to return to the shopping center to distribute handbills, he had not done so because of his concern that he, too, would be arrested for violation of § 26–1503; the parties stipulated that, if petitioner returned and refused upon request to stop handbilling, a warrant would be sworn out and he might be arrested and charged with a violation of the Georgia statute.[4]

After hearing, the District Court denied all relief and dismissed the action, finding that "no meaningful contention can be made that the state has [acted] or will in the future act in bad faith," and therefore "the rudiments of an active controversy between the parties . . . [are] lacking." 334 F. Supp. 1386, 1389–1390 (1971). Petitioner appealed[5] only from the denial of declaratory relief.[6] The Court of Appeals for the Fifth Circuit, one judge concurring in the result, affirmed the District Court's

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[3] We were advised at oral argument that the trial of petitioner's companion, Sandra Lee Becker, has been stayed pending decision of this case. See Tr. of Oral Arg. 31.

[4] At the District Court hearing, counsel for the police officers indicated that arrests in fact would be made if warrants sworn out by shopping center personnel were facially proper. R. 134.

[5] The complaint was initially styled as a class action. Named as plaintiffs were petitioner, a minor suing through his father; Sandra Lee Becker, petitioner's handbilling companion against whom a prosecution was pending under the Georgia statute, see n. 3, *supra*, also a minor suing through her father; and the Atlanta Mobilization Committee. The complaint had also sought to enjoin plaintiff Becker's pending prosecution. Only petitioner appealed from the District Court's decision denying all relief.

[6] Petitioner's notice of appeal challenged the denial of both injunctive and declaratory relief. However, in his appellate brief, he abandoned his appeal from denial of injunctive relief. *Becker* v. *Thompson*, 459 F. 2d 919, 921 (CA5 1972).

judgment refusing declaratory relief.[7] *Becker* v. *Thompson*, 459 F. 2d 919 (1972). The court recognized that the holdings of *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), were expressly limited to situations where state prosecutions were pending when the federal action commenced, but was of the view that *Younger* v. *Harris* "made it clear beyond peradventure that irreparable injury must be measured by bad faith harassment and such test must be applied to a request for injunctive relief against *threatened* state court criminal prosecution" as well as against a pending prosecution; and, furthermore, since the opinion in *Samuels* v. *Mackell* reasoned that declaratory relief would normally disrupt the state criminal justice system in the manner of injunctive relief, it followed that "the same test of bad

[7] Since the complaint had originally sought to enjoin enforcement of the state statute on grounds of unconstitutionality, a three-judge district court should have been convened. See 28 U. S. C. § 2281; *Goosby* v. *Osser*, 409 U. S. 512 (1973); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962). A three-judge court is required even if the constitutional attack—as here—is upon the statute as applied, see *Department of Employment* v. *United States*, 385 U. S. 355 (1966); *Query* v. *United States*, 316 U. S. 486 (1942); *Ex parte Bransford*, 310 U. S. 354, 361 (1940); see generally Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37–50 (1964); and is normally required even if the decision is to dismiss under *Younger-Samuels* principles, since an exercise of discretion will usually be necessary, see *Jones* v. *Wade*, 479 F. 2d 1176, 1180 (CA5 1973); *Abele* v. *Markle*, 452 F. 2d 1121, 1125 (CA2 1971); see generally Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 309 (1963). But since petitioner's request for injunctive relief was abandoned on appeal, see n. 6, *supra*, and only a request for declaratory relief remained, the Court of Appeals did not err in exercising jurisdiction over the appeal. Cf. *Roe* v. *Wade*, 410 U. S. 113, 123 (1973); *Mitchell* v. *Donovan*, 398 U. S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 152–155 (1963); *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 16 (1930).

faith harassment is prerequisite . . . for declaratory relief in a threatened prosecution." 459 F. 2d, at 922. A petition for rehearing en banc was denied, three judges dissenting. 463 F. 2d 1338 (1972).[8]

We granted certiorari, 410 U. S. 953 (1973), and now reverse.

I

At the threshold we must consider whether petitioner presents an "actual controversy," a requirement imposed by Art. III of the Constitution and the express terms of the Federal Declaratory Judgment Act, 28 U. S. C. § 2201.[9]

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[8] Other federal courts have entertained applications for injunctive and declaratory relief in the absence of a pending state prosecution. See, *e. g.*, *Thoms* v. *Heffernan*, 473 F. 2d 478 (CA2 1973), aff'g 334 F. Supp. 1203 (Conn. 1971) (three-judge court); *Wulp* v. *Corcoran*, 454 F. 2d 826 (CA1 1972); *Crossen* v. *Breckenridge*, 446 F. 2d 833 (CA6 1971); *Lewis* v. *Kugler*, 446 F. 2d 1343 (CA3 1971); *Anderson* v. *Vaughn*, 327 F. Supp. 101 (Conn. 1971) (three-judge court). Even the Court of Appeals for the Fifth Circuit has limited the scope of the instant decision by entertaining an action for declaratory and injunctive relief in the absence of a state prosecution when the federal suit attacked the facial validity of a state statute rather than the validity of the statute as applied. See *Jones* v. *Wade*, *supra* (Wisdom, J.).

[9] Section 2201 provides:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Section 2202 further provides:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Unlike three of the appellees in *Younger* v. *Harris*, 401 U. S., at 41, petitioner has alleged threats of prosecution that cannot be characterized as "imaginary or speculative," *id.*, at 42. He has been twice warned to stop handbilling that he claims is constitutionally protected and has been told by the police that if he again handbills at the shopping center and disobeys a warning to stop he will likely be prosecuted. The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been "chimerical," *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961). In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. See, *e. g.*, *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). Moreover, petitioner's challenge is to those specific provisions of state law which have provided the basis for threats of criminal prosecution against him. Cf. *Boyle* v. *Landry*, 401 U. S. 77, 81 (1971); *Watson* v. *Buck*, 313 U. S. 387, 399–400 (1941).

Nonetheless, there remains a question as to the *continuing* existence of a live and acute controversy that must be resolved on the remand we order today.[10] In *Golden* v. *Zwickler*, 394 U. S. 103 (1969), the appellee sought a declaratory judgment that a state criminal statute prohibiting the distribution of anonymous election-campaign literature was unconstitutional. The appellee's complaint had expressed a desire to distribute handbills during the forthcoming re-election campaign of a Congressman, but it was later learned that the Con-

[10] The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. See, *e. g.*, *Roe* v. *Wade*, 410 U. S., at 125; *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403 (1972); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

gressman had retired from the House of Representatives to become a New York Supreme Court Justice. In that circumstance, we found no extant controversy, since the record revealed that appellee's sole target of distribution had been the Congressman and there was no immediate prospect of the Congressman's again becoming a candidate for public office. Here, petitioner's complaint indicates that his handbilling activities were directed "against the War in Vietnam and the United States' foreign policy in Southeast Asia." Since we cannot ignore the recent developments reducing the Nation's involvement in that part of the world, it will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); see *Zwickler* v. *Koota*, 389 U. S. 241, 244 n. 3 (1967).

II

We now turn to the question of whether the District Court and the Court of Appeals correctly found petitioner's request for declaratory relief inappropriate.

Sensitive to principles of equity, comity, and federalism, we recognized in *Younger* v. *Harris, supra,* that federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions. We were cognizant that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility,

equally with the federal courts "to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ." *Robb* v. *Connolly,* 111 U. S. 624, 637 (1884). In *Samuels* v. *Mackell, supra,* the Court also found that the same principles ordinarily would be flouted by issuance of a federal declaratory judgment when a state proceeding was pending, since the intrusive effect of declaratory relief "will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." 401 U. S., at 72.[11] We therefore held in *Samuels* that, "in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment . . . ." *Id.,* at 73.

Neither *Younger* nor *Samuels,* however, decided the question whether federal intervention might be permissible in the absence of a pending state prosecution. In *Younger,* the Court said:

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U. S., at 41.

See also *id.,* at 55 (STEWART and Harlan, JJ., concurring); *id.,* at 57 (BRENNAN, WHITE, and MARSHALL, JJ., concurring). Similarly, in *Samuels* v. *Mackell,* the Court stated:

> "We, of course, express no views on the propriety

[11] The Court noted that under 28 U. S. C. § 2202 a declaratory judgment might serve as the basis for issuance of a later injunction to give effect to the declaratory judgment, see n. 9, *supra,* and that a declaratory judgment might have a res judicata effect on the pending state proceeding. 401 U. S., at 72.

> of declaratory relief when no state proceeding is pending at the time the federal suit is begun." 401 U. S., at 73–74.

See also *id.*, at 55 (STEWART and Harlan, JJ., concurring); *id.*, at 75–76 (BRENNAN, WHITE, and MARSHALL, JJ., concurring).

These reservations anticipated the Court's recognition that the relevant principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding." *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509 (1972). When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. Cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 490 (1965).

When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief. Here, the Court of Appeals held that, because injunctive relief would not be appropriate since petitioner failed to demonstrate irreparable injury—a traditional prerequisite to

injunctive relief, *e. g., Dombrowski* v. *Pfister, supra*—it followed that declaratory relief was also inappropriate. Even if the Court of Appeals correctly viewed injunctive relief as inappropriate—a question we need not reach today since petitioner has abandoned his request for that remedy, see n. 6 *supra*—[12] the court erred in treating the requests for injunctive and declaratory relief as a single issue. "[W]hen no state prosecution is pending and the only question is whether declaratory relief is appropriate[,] . . . the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance." *Perez* v. *Ledesma*, 401 U. S. 82, 104 (1971) (separate opinion of BRENNAN, J.).

The subject matter jurisdiction of the lower federal courts was greatly expanded in the wake of the Civil War. A pervasive sense of nationalism led to enactment of the Civil Rights Act of 1871, 17 Stat. 13, empowering the

[12] We note that, in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution *for past conduct*, sufficient injury has not been found to warrant injunctive relief, see *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45 (1941); *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 (1935); *Fenner* v. *Boykin*, 271 U. S. 240 (1926). There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to *forgo* constitutionally protected activity in order to avoid arrest. Compare *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925); and *Terrace* v. *Thompson*, 263 U. S. 197, 214, 216 (1923), with *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943); see generally Note, Implications of the *Younger* Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending, 72 Col. L. Rev. 874 (1972).

lower federal courts to determine the constitutionality of actions, taken by persons under color of state law, allegedly depriving other individuals of rights guaranteed by the Constitution and federal law, see 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3).[13] Four years later, in the Judiciary Act of March 3, 1875, 18 Stat. 470, Congress conferred upon the lower federal courts, for but the second time in their nearly century-old history, general federal-question jurisdiction subject only to a jurisdictional-amount requirement, see 28 U. S. C. § 1331.[14] With this latter enactment, the lower federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928) (emphasis added).[15] These two statutes, together with the Court's decision in *Ex parte Young*, 209 U. S. 123 (1908)—holding that state officials who threaten to enforce an unconstitutional state statute may be enjoined by a federal court of equity and that a federal court may, in appropriate circumstances, enjoin

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[13] "Sensitiveness to 'states' rights', fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer trusted to the enforcement of state agencies." F. Frankfurter & J. Landis, The Business of the Supreme Court 64 (1928).

[14] In the last days of the John Adams administration, general federal-question jurisdiction had been granted to the federal courts by § 11 of the Midnight Judges Act, 2 Stat. 92 (1801). The Act was repealed only one year later by § 1 of the Act of Mar. 8, 1802, 2 Stat. 132.

[15] The histories of the Civil Rights Act of 1871 and the Judiciary Act of 1875 are detailed in *Zwickler* v. *Koota*, 389 U. S. 241, 245–247 (1967).

future state criminal prosecutions under the unconstitutional Act—have "established the modern framework for federal protection of constitutional rights from state interference." *Perez* v. *Ledesma, supra,* at 107 (separate opinion of BRENNAN, J.).

A "storm of controversy" raged in the wake of *Ex parte Young,* focusing principally on the power of a single federal judge to grant *ex parte* interlocutory injunctions against the enforcement of state statutes, H. Hart & H. Wechsler, The Federal Courts and the Federal System 967 (2d ed. 1973); see generally *Goldstein* v. *Cox,* 396 U. S. 471 (1970); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 804–805 (1934). This uproar was only partially quelled by Congress' passage of legislation, 36 Stat. 557, requiring the convening of a three-judge district court [16] before a preliminary injunction against enforcement of a state statute could issue, and providing for direct appeal to this Court from a decision granting or denying such relief.[17] See 28

[16] The three-judge-court procedure, with expedited review, was modeled after the Expediting Act, 32 Stat. 823, now 15 U. S. C. §§ 28–29; 49 U. S. C. §§ 44–45, requiring that for certain antitrust cases certified by the Attorney General to be of particular public importance a three-judge court be convened with direct appeal to the Supreme Court, as well as a 1906 Act, 34 Stat. 584, 592, applying the same procedure to suits brought to restrain, annul, or set aside orders of the Interstate Commerce Commission. See Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 810 (1934).

[17] The three-judge-court provision was amended in 1913 to apply also to interlocutory injunctions restraining enforcement of state administrative or commission orders. C. 160, 37 Stat. 1013. It was further amended in 1925 to extend the three-judge requirement and the direct-appeal provisions to the final hearing on a permanent injunction, thereby ending the anomalous situation in which a single judge, at the final hearing, could overrule the decision of three judges granting an interlocutory injunction. 43 Stat. 936, 938. When the statute was codified in 1948, it was made applicable to all actions

U. S. C. §§ 2281, 1253. From a State's viewpoint the granting of injunctive relief—even by these courts of special dignity—"rather clumsily" crippled state enforcement of its statutes pending further review, see H. R. Rep. No. 288, 70th Cong., 1st Sess., 2 (1928); H. R. Rep. No. 94, 71st Cong., 2d Sess., 2 (1929); H. R. Rep. No. 627, 72d Cong., 1st Sess., 2 (1932). Furthermore, plaintiffs were dissatisfied with this method of testing the constitutionality of state statutes, since it placed upon them the burden of demonstrating the traditional prerequisites to equitable relief—most importantly, irreparable injury. See, *e. g.*, *Fenner* v. *Boykin*, 271 U. S. 240, 243 (1926).

To dispel these difficulties, Congress in 1934 enacted the Declaratory Judgment Act, 28 U. S. C. §§ 2201–2202. That Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable is amply evidenced by the legislative history of the Act, traced in full detail in *Perez* v. *Ledesma*, *supra*, at 111–115 (separate opinion of BRENNAN, J.). The highlights of that history, particularly pertinent to our inquiry today, emphasize that:

> "[I]n 1934, without expanding or reducing the subject matter jurisdiction of the federal courts, or in any way diminishing the continuing vitality of *Ex parte Young* with respect to federal injunctions, Congress empowered the federal courts to grant a new remedy, the declaratory judgment. . . .

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seeking either a preliminary or permanent injunction, *Goldstein* v. *Cox*, 396 U. S. 471, 478 n. 3 (1970). See generally H. Hart & H. Wechsler, The Federal Courts and the Federal System 967–968 (2d ed. 1973); C. Wright, Federal Courts § 50, pp. 188–189 (2d ed. 1970).

"The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy. . . . Of particular significance on the question before us, the Senate report [S. Rep. No. 1005, 73d Cong., 2d Sess. (1934)] makes it even clearer that the declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate. . . .

. . . . . .

"Much of the hostility to federal injunctions referred to in the Senate report was hostility to their use against state officials seeking to enforce state regulatory statutes carrying criminal sanctions; this was the strong feeling that produced the Three-Judge Court Act in 1910, the Johnson Act of 1934, 28 U. S. C. § 1342, and the Tax Injunction Act of 1937, 28 U. S. C. § 1341. The Federal Declaratory Judgment Act was intended to provide an alternative to injunctions against state officials, except where there was a federal policy against federal adjudication of the class of litigation altogether. . . . Moreover, the Senate report's clear implication that declaratory relief would have been appropriate in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), and *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365 (1926), both cases involving federal adjudication of the constitutionality of a state statute carrying criminal penalties, and the report's quotation from *Terrace* v. *Thompson,* which also involved anticipatory federal adjudication of the constitutionality of a state criminal statute, make it plain that Congress anticipated that the declaratory judgment procedure would be used by the federal courts to test the con-

stitutionality of state criminal statutes." 401 U. S., at 111–112, 115.[18]

It was this history that formed the backdrop to our decision in *Zwickler* v. *Koota*, 389 U. S. 241 (1967), where a state criminal statute was attacked on grounds of unconstitutional overbreadth and no state prosecution was pending against the federal plaintiff. There, we found error in a three-judge district court's considering, as a single question, the propriety of granting injunctive and declaratory relief. Although we noted that injunctive relief might well be unavailable under principles of equity jurisprudence canvassed in *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), we held that "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U. S., at 254. Only one year ago, we

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[18] As Professor Borchard, a principal proponent and author of the Federal Declaratory Judgment Act, said in a written statement introduced at the hearings on the Act:

"It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff to his option, either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to [forgo], in the fear of prosecution, the exercise of his claimed rights. Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality." Hearings on H. R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 75–76 (1928). See E. Borchard, Declaratory Judgments x–xi (2d ed. 1941).

reaffirmed the *Zwickler* v. *Koota* holding in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973). In those two cases, we declined to decide whether the District Courts had properly denied to the federal plaintiffs, against whom no prosecutions were pending, injunctive relief restraining enforcement of the Texas and Georgia criminal abortion statutes; instead, we affirmed the issuance of declaratory judgments of unconstitutionality, anticipating that these would be given effect by state authorities. We said:

> "The Court has recognized that *different considerations* enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler* v. *Koota,* 389 U. S. 241, 252–255 (1967); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965)." *Roe* v. *Wade, supra,* at 166 (emphasis added).

See *Doe* v. *Bolton, supra,* at 201.

The "different considerations" entering into a decision whether to grant declaratory relief have their origins in the preceding historical summary. First, as Congress recognized in 1934, a declaratory judgment will have a less intrusive effect on the administration of state criminal laws. As was observed in *Perez* v. *Ledesma,* 401 U. S., at 124–126 (separate opinion of BRENNAN, J.):

> "Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear. A state statute may be declared unconstitutional *in toto*—that is, incapable of having constitutional applications; or it may be declared unconstitutionally vague or overbroad—that is, incapable of being constitutionally applied to the full extent of its purport. In either case, a federal declaration of unconstitutionality reflects the

opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute. If a declaration of partial unconstitutionality is affirmed by this Court, the implication is that this Court will overturn particular applications of the statute, but that if the statute is narrowly construed by the state courts it will not be incapable of constitutional applications. Accordingly, the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would. Thus, where the highest court of a State has had an opportunity to give a statute regulating expression a narrowing or clarifying construction but has failed to do so, and later a federal court declares the statute unconstitutionally vague or overbroad, it may well be open to a state prosecutor, after the federal court decision, to bring a prosecution under the statute if he reasonably believes that the defendant's conduct is not constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction. Even where a declaration of unconstitutionality is not reviewed by this Court, the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew. Finally, the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with

> a view to the proper workings of a federal system. What is clear, however, is that even though a declaratory judgment has 'the force and effect of a final judgment,' 28 U. S. C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." [19] (Footnote omitted.)

Second, engrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.

> "Were the law to be that a plaintiff could not obtain a declaratory judgment that a local ordinance was unconstitutional when no state prosecution is pending unless he could allege and prove circumstances justifying a federal injunction of an existing state prosecution, the Federal Declaratory Judgment Act would have been *pro tanto* repealed." *Wulp* v. *Corcoran,* 454 F. 2d 826, 832 (CA1 1972) (Coffin, J.).

See *Perez* v. *Ledesma,* 401 U. S., at 116 (separate opinion of BRENNAN, J.). Thus, the Court of Appeals was in error when it ruled that a failure to demonstrate irreparable injury—a traditional prerequisite to injunctive relief,

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[19] The pending prosecution of petitioner's handbilling companion does not affect petitioner's action for declaratory relief. In *Roe* v. *Wade,* 410 U. S. 113 (1973), while the pending prosecution of Dr. Hallford under the Texas Abortion law was found to render his action for declaratory and injunctive relief impermissible, this did not prevent our granting plaintiff Roe, against whom no action was pending, a declaratory judgment that the statute was unconstitutional. *Id.,* at 125–127, 166–167; see *Lewis* v. *Kugler,* 446 F. 2d 1343, 1349 (CA3 1971).

having no equivalent in the law of declaratory judgments, see *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241 (1937); *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933)—precluded the granting of declaratory relief.

The only occasions where this Court has disregarded these "different considerations" and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention in a class of adjudications. See *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943) (federal policy against interfering with the enforcement of state tax laws);[20] *Samuels* v. *Mackell*, 401 U. S. 66 (1971). In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3)—as they are here—we have not required exhaustion of state judicial or administrative remedies,

[20] In *Great Lakes Co.* v. *Huffman*, employers sought a declaration that a state unemployment compensation scheme imposing a tax upon them was unconstitutional as applied. Although not relying on the precise terms of 28 U. S. C. § 41 (1) (1940 ed.), now 28 U. S. C. § 1341, which ousts the district courts of jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," the Court, recognizing the unique effects of anticipatory adjudication on tax administration, held that declaratory relief should be withheld when the taxpayer was provided an opportunity to maintain a refund suit after payment of the disputed tax. "In contrast, there is no statutory counterpart of 28 U. S. C. § 1341 applicable to intervention in state criminal prosecutions." *Perez* v. *Ledesma*, 401 U. S. 82, 128 (1971) (separate opinion of BRENNAN, J.).

recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, *e. g., McNeese* v. *Board of Education,* 373 U. S. 668 (1963); *Monroe* v. *Pape,* 365 U. S. 167 (1961). But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution had been commenced.

III

Respondents, however, relying principally upon our decision in *Cameron* v. *Johnson,* 390 U. S. 611 (1968), argue that, although it may be appropriate to issue a declaratory judgment when no state criminal proceeding is pending and the attack is upon the *facial validity* of a state criminal statute, such a step would be improper where, as here, the attack is merely upon the constitutionality of the statute as applied, since the State's interest in unencumbered enforcement of its laws outweighs the minimal federal interest in protecting the constitutional rights of only a single individual. We reject the argument.

In *Cameron* v. *Johnson,* the appellants sought a declaratory judgment that a Mississippi anti-picketing law was an overly broad and vague regulation of protected expression and an injunction restraining *pending* prosecutions against them for violations of the statute. We agreed with the District Court that the statute was not overly broad or vague and that nothing in the record supported appellants' assertion that they were being prosecuted in bad faith. In that circumstance, we held that "[t]he mere possibility of erroneous application of the statute does not amount 'to the irreparable injury necessary to justify a disruption of orderly state proceedings.' . . . The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceeding to

escape the finding that the State had no expectation of securing valid convictions." *Id.*, at 621. Our holding in *Cameron* was thus that the state courts in which prosecutions were already pending would have to be given the first opportunity to correct any misapplication of the state criminal laws; *Cameron* is plainly not authority for the proposition that, in the absence of a pending state proceeding, a federal plaintiff may not seek a declaratory judgment that the state statute is being applied in violation of his constitutional rights.

Indeed, the State's concern with potential interference in the administration of its criminal laws is of lesser dimension when an attack is made upon the constitutionality of a state statute as applied. A declaratory judgment of a lower federal court that a state statute is invalid *in toto*—and therefore incapable of any valid application—or is overbroad or vague—and therefore no person can properly be convicted under the statute until it is given a narrowing or clarifying construction, see, *e. g., United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 369 (1971); *Gooding* v. *Wilson,* 405 U. S. 518, 520 (1972)—will likely have a more significant potential for disruption of state enforcement policies than a declaration specifying a limited number of impermissible applications of the statute. While the federal interest may be greater when a state statute is attacked on its face, since there exists the potential for eliminating any broad-ranging deterrent effect on would-be actors, see *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), we do not find this consideration controlling. The solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others.[21]

[21] Abstention, a question "entirely separate from the question of granting declaratory or injunctive relief," *Lake Carriers' Assn.* v.

We therefore hold that, regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied.[22] The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, concurring.

While joining the opinion of the Court, I add a word by way of emphasis.

MacMullan, 406 U. S. 498, 509 n. 13 (1972), might be more appropriate when a challenge is made to the state statute as applied, rather than upon its face, since the reach of an uncertain state statute might, in that circumstance, be more susceptible of a limiting or clarifying construction that would avoid the federal constitutional question. Cf. *Zwickler* v. *Koota*, 389 U. S., at 249–252, 254; *Baggett* v. *Bullitt*, 377 U. S. 360, 375–378 (1964).

[22] Some two years after petitioner attempted to handbill at the shopping center, respondent Hudgens, the owner of the center, commenced an action in the Superior Court of Fulton County seeking a declaration of his rights concerning the center's rules against handbilling and related activities. We were advised at oral argument that the state action had been dismissed by the trial court but that an appeal is pending before the Georgia Supreme Court. Since we do not require petitioner first to seek vindication of his federal rights in a state declaratory judgment action, see *Lake Carriers' Assn.* v. *MacMullan*, *supra*, at 510; *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), consideration of abstention by the District Court would be inappropriate unless the action commenced by respondent Hudgens could be shown to present a substantial and immediate possibility of obviating petitioner's federal claim by a decision on state law grounds. Cf. *Askew* v. *Hargrave*, 401 U. S. 476, 478 (1971); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970).

Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels "chilled" in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it.

As the Court stated in *Younger* v. *Harris*, 401 U. S. 37, 52:

> "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . ."

See also *Boyle* v. *Landry*, 401 U. S. 77, 80–81.

The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated "a genuine threat of enforcement of a disputed state criminal statute . . . ."* Cases where such a "genuine threat" can be demonstrated will, I think, be exceedingly rare.

MR. JUSTICE WHITE, concurring.

I offer the following few words in light of MR. JUSTICE REHNQUIST's concurrence in which he discusses the impact on a pending federal action of a later filed criminal prosecution against the federal plaintiff, whether a federal court may enjoin a state criminal prosecution under a statute the federal court has earlier declared unconstitu-

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*See *ante*, at 475. Whether, in view of "recent developments," the controversy is a continuing one, will be for the District Court to determine on remand. See *ante*, at 460.

tional at the suit of the defendant now being prosecuted, and the question whether that declaratory judgment is res judicata in such a later filed state criminal action.

It should be noted, first, that his views on these issues are neither expressly nor impliedly embraced by the Court's opinion filed today. Second, my own tentative views on these questions are somewhat contrary to my Brother's.

At this writing at least, I would anticipate that a final declaratory judgment entered by a federal court holding particular conduct of the federal plaintiff to be immune on federal constitutional grounds from prosecution under state law should be accorded res judicata effect in any later prosecution of that very conduct. There would also, I think, be additional circumstances in which the federal judgment should be considered as more than a mere precedent bearing on the issue before the state court.

Neither can I at this stage agree that the federal court, having rendered a declaratory judgment in favor of the plaintiff, could not enjoin a later state prosecution for conduct that the federal court has declared immune. The Declaratory Judgment Act itself provides that a "declaration shall have the force and effect of a final judgment or decree," 28 U. S. C. § 2201; eminent authority anticipated that declaratory judgments would be res judicata, E. Borchard, Declaratory Judgments 10–11 (2d ed. 1941); and there is every reason for not reducing declaratory judgments to mere advisory opinions. *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941), once expressed the view that 28 U. S. C. § 2283 forbade injunctions against relitigation in state courts of federally decided issues, but the section was then amended to overrule that case, the consequence being that "[i]t is clear that the Toucey rule

is gone, and that to protect or effectuate its judgment a federal court may enjoin relitigation in the state court." C. Wright, Federal Courts 180 (2d ed. 1970). I see no more reason here to hold that the federal plaintiff must always rely solely on his plea of res judicata in the state courts. The statute provides for "[f]urther necessary or proper relief . . . against any adverse party whose rights have been determined by such judgment," 28 U. S. C. § 2202, and it would not seem improper to enjoin local prosecutors who refuse to observe adverse federal judgments.

Finally, I would think that a federal suit challenging a state criminal statute on federal constitutional grounds could be sufficiently far along so that ordinary consideration of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed and the federal question may be litigated there.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring.

I concur in the opinion of the Court. Although my reading of the legislative history of the Declaratory Judgment Act of 1934 suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury had occurred, rather than to palliate any controversy arising from *Ex parte Young*, 209 U. S. 123 (1908), Congress apparently was aware at the time it passed the Act that persons threatened with state criminal prosecutions might choose to forgo the offending conduct and instead seek a federal declaration of their rights. Use of the declaratory judgment procedure in the circumstances presented by this case seems consistent with that congressional expectation.

If this case were the Court's first opportunity to deal with this area of law, I would be content to let the

matter rest there. But, as our cases abundantly illustrate, this area of law is in constant litigation, and it is an area through which our decisions have traced a path that may accurately be described as sinuous. Attempting to accommodate the principles of the new declaratory judgment procedure with other more established principles—in particular a proper regard for the relationship between the independent state and federal judiciary systems—this Court has acted both to advance and to limit the Act. Compare *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937), and *Zwickler* v. *Koota*, 389 U. S. 241 (1967), with *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971). Because the opinion today may possibly be read by resourceful counsel as commencing a new and less restrictive curve in this path of adjudication, I feel it is important to emphasize what the opinion does and does not say.

To begin with, it seems appropriate to restate the obvious: the Court's decision today deals only with declaratory relief and with threatened prosecutions. The case provides no authority for the granting of any injunctive relief nor does it provide authority for the granting of any relief at all when prosecutions are pending. The Court quite properly leaves for another day whether the granting of a declaratory judgment by a federal court will have any subsequent res judicata effect or will perhaps support the issuance of a later federal injunction. But since possible resolutions of those issues would substantially undercut the principles of federalism reaffirmed in *Younger* v. *Harris*, 401 U. S. 37 (1971), and preserved by the decision today, I feel it appropriate to add a few remarks.

First, the legislative history of the Declaratory Judgment Act and the Court's opinion in this case both

recognize that the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity.[1] There is nothing in the Act's history to suggest that Congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct. Thus I do not believe that a federal plaintiff in a declaratory judgment action can avoid, by the mere filing of a complaint, the principles so firmly expressed in *Samuels, supra.* The plaintiff who continues to violate a state statute after the filing of his federal complaint does so both at the risk of state prosecution and at the risk of dismissal of his federal lawsuit. For any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels.*

Second, I do not believe that today's decision can properly be raised to support the issuance of a federal injunction based upon a favorable declaratory judgment.[2]

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[1] The report accompanying the Senate version of the bill stated: "The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity. . . . Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties." S. Rep. No. 1005, 73d Cong., 2d Sess., 2–3 (1934).

Petitioner in this case, of course, did cease his handbilling activities after the warning of arrest.

[2] In *Samuels* v. *Mackell,* 401 U. S. 66, 72 (1971), the Court expressed concern that a declaratory judgment issued while a state prosecution was pending "might serve as the basis for a subsequent injunction against those proceedings . . . ." The Court recognized that this chain of litigation would "result in a clearly improper inter-

The Court's description of declaratory relief as " 'a milder alternative to the injunction remedy,' " *ante,* at 467, having a "less intrusive effect on the administration of state criminal laws" than an injunction, *ante,* at 469, indicates to me critical distinctions which make declaratory relief appropriate where injunctive relief would not be. It would all but totally obscure these important distinctions if a successful application for declaratory relief came to be regarded, not as the conclusion of a lawsuit, but as a giant step toward obtaining an injunction against a subsequent criminal prosecution. The availability of injunctive relief must be considered with an eye toward the important policies of federalism which this Court has often recognized.

If the rationale of cases such as *Younger* and *Samuels* turned in any way upon the relative ease with which a federal district court could reach a conclusion about the constitutionality of a challenged state statute, a preexisting judgment declaring the statute unconstitutional as applied to a particular plaintiff would, of course, be a factor favoring the issuance of an injunction as "further relief" under the Declaratory Judgment Act. But, except for statutes that are " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph . . . ,' " *Younger* v. *Harris, supra,* at 53, the rationale of those cases has no such basis. Their direction that federal courts not interfere with state prosecutions does not vary depending on the closeness of the constitutional issue or on the degree of confidence which the federal court possesses in the correctness of its conclusions on the constitutional

ference with the state proceedings." *Ibid.* As discussed, *infra,* I believe that such improper interference would be present even though the declaratory judgment itself were issued prior to the time of the federal plaintiff's arrest.

point. Those decisions instead depend upon considerations relevant to the harmonious operation of separate federal and state court systems, with a special regard for the State's interest in enforcing its own criminal laws, considerations which are as relevant in guiding the action of a federal court which has previously issued a declaratory judgment as they are in guiding the action of one which has not. While the result may be that injunctive relief is not available as "further relief" under the Declaratory Judgment Act in this particular class of cases whereas it would be in similar cases not involving considerations of federalism, this would be no more a *pro tanto* repeal of that provision of the Declaratory Judgment Act than was *Younger* a *pro tanto* repeal of the All Writs Act, 28 U. S. C. § 1651.

A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions. State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties. If the federal plaintiff pursues the conduct for which he was previously threatened with arrest and is in fact arrested, he may not return the controversy to federal court, although he may, of course, raise the federal declaratory judgment in the state court for whatever value it may prove to have.[3] In any event, the defendant at that point is able to present his case

[3] The Court's opinion notes that the possible res judicata effect of a federal declaratory judgment in a subsequent state court prosecution is a question "'not free from difficulty.'" *Ante*, at 470. I express no opinion on that issue here. However, I do note that the federal decision would not be accorded the *stare decisis* effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might, of course, be viewed as highly persuasive.

for full consideration by a state court charged, as are the federal courts, to preserve the defendant's constitutional rights. Federal interference with this process would involve precisely the same concerns discussed in *Younger* and recited in the Court's opinion in this case.[4]

Third, attempts to circumvent *Younger* by claiming that enforcement of a statute declared unconstitutional by a federal court is *per se* evidence of bad faith should not find support in the Court's decision in this case. As the Court notes, quoting my Brother BRENNAN'S separate opinion in *Perez* v. *Ledesma*, 401 U. S. 82, 125:

> "The persuasive force of the [federal] court's opinion and judgment *may* lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction *may* be changed, or the legislature *may* repeal the statute and start anew." (Emphasis added.)

This language clearly recognizes that continued belief in the constitutionality of the statute by state prosecutorial officials would not commonly be indicative of bad faith and that such allegations, in the absence of highly unusual circumstances, would not justify a federal

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[4] The Court's opinion says:

"Sensitive to principles of equity, comity, and federalism, we recognized in *Younger* v. *Harris*, [401 U. S. 37 (1971),] that federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions. We were cognizant that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . .' *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884)." *Ante*, at 460–461.

court's departure from the general principles of restraint discussed in *Younger*.

If the declaratory judgment remains, as I think the Declaratory Judgment Act intended, a simple declaration of rights without more, it will not be used merely as a dramatic tactical maneuver on the part of any state defendant seeking extended delays. Nor will it force state officials to try cases time after time, first in the federal courts and then in the state courts. I do not believe Congress desired such unnecessary results, and I do not think that today's decision should be read to sanction them. Rather the Act, and the decision, stand for the sensible proposition that both a potential state defendant, threatened with prosecution but not charged, and the State itself, confronted by a possible violation of its criminal laws, may benefit from a procedure which provides for a declaration of rights without activation of the criminal process. If the federal court finds that the threatened prosecution would depend upon a statute it judges unconstitutional, the State may decide to forgo prosecution of similar conduct in the future, believing the judgment persuasive. Should the state prosecutors not find the decision persuasive enough to justify forbearance, the successful federal plaintiff will at least be able to bolster his allegations of unconstitutionality in the state trial with a decision of the federal district court in the immediate locality. The state courts may find the reasoning convincing even though the prosecutors did not. Finally, of course, the state legislature may decide, on the basis of the federal decision, that the statute would be better amended or repealed. All these possible avenues of relief would be reached voluntarily by the States and would be completely consistent with the concepts of federalism discussed above. Other more intrusive forms of relief should not be routinely available.

These considerations should prove highly significant in reaching future decisions based upon the decision rendered today. For the present it is enough to say, as the Court does, that petitioner, if he successfully establishes the existence of a continuing controversy on remand, may maintain an action for a declaratory judgment in the District Court.

UNITED STATES *v.* GENERAL DYNAMICS CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 72–402. Argued December 5, 1973—Decided March 19, 1974

Material Service Corp., a deep-mining coal producer, and its successor, appellee General Dynamics Corp., acquired, through stock purchases, control of appellee United Electric Coal Companies, a strip-mining coal producer. The Government brought suit alleging that this acquisition violated § 7 of the Clayton Act. The District Court found no violation on the ground, *inter alia*, that the Government's evidence—consisting principally of past production statistics showing that within certain geographic markets the coal industry was concentrated among a small number of large producers, that this concentration was increasing, and that the acquisition here would materially enlarge the acquiring company's market share and thereby contribute to the concentration trend—did not support the Government's contention that the acquisition substantially lessened competition in the production and sale of coal in either or both of two specified geographic markets. This conclusion was primarily based on a determination that United Electric's coal reserves were so low that its potential to compete with other producers in the future was far weaker than the aggregate production statistics relied on by the Government might otherwise have indicated, virtually all of United Electric's proved reserves being either depleted or already committed by long-term contracts with large customers so that its power to affect the price of coal was severely limited and steadily diminishing. *Held:*

1. While the Government's statistical showing might have been sufficient to support a finding of "undue concentration" in the absence of other considerations, the District Court was justified in finding that other pertinent factors affecting the coal industry and appellees' business mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition. Ample evidence showed that United Electric does not have sufficient reserves, which are a key factor in measuring

a coal producer's market strength, to make it a significant competitive force. Thus, in terms of probable future ability to compete, rather than in terms of past production on which the Government relied, the court was warranted in concluding that the merger did not violate § 7 of the Act. Pp. 494–504.

2. The District Court was justified in considering postacquisition evidence relating to changes in the patterns and structure of the coal industry and in United Electric's reserve situation, since (unlike evidence showing only that no lessening of competition has yet occurred) the demonstration of weak coal resources necessarily implied that United Electric was not merely disinclined but unable to compete effectively for future contracts, such evidence going directly to the question whether future lessening of competition was probable. Pp. 504–506.

3. United Electric's weak reserves position, rather than establishing a "failing company" defense by showing that the company would have gone out of business but for the merger, went to the heart of the Government's statistical prima facie case and substantiated the District Court's conclusion that United Electric, even if it remained in the market, did not have sufficient reserves to compete effectively for long-term contracts, and therefore appellees' failure to meet the prerequisites of a failing-company defense did not detract from the validity of the District Court's analysis. Pp. 506–508.

4. Under the "clearly erroneous" standard of Fed. Rule Civ. Proc. 52 (a), which governs as fully on direct appeal to this Court as on review by a court of appeals, the District Court's findings and conclusions are supported by the evidence and are not clearly erroneous. P. 508.

5. The District Court found new strip reserves unavailable, and the mere possibility that United Electric could some day acquire expertise to mine deep reserves does not depreciate the validity of the conclusion that United Electric at the time of trial did not have the power to compete effectively for long-term contracts, nor does it give the production statistics relied on by the Government more significance than the District Court ascribed to them. Pp. 508–510.

341 F. Supp. 534, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUG-

LAS, J., filed a dissenting opinion in which BRENNAN, WHITE, and MARSHALL, JJ., joined, *post*, p. 511.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Bork*, former *Solicitor General Griswold*, *Assistant Attorney General Kauper*, *Mark L. Evans*, and *Carl D. Lawson*.

Reuben L. Hedlund argued the cause for appellees. With him on the brief were *Hammond E. Chaffetz*, *Donald G. Kempf, Jr.*, and *Albert E. Jenner, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On September 22, 1967, the Government commenced this suit in the United States District Court for the Northern District of Illinois, challenging as violative of § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18, the acquisition of the stock of United Electric Coal Companies by Material Service Corp. and its successor, General Dynamics Corp. After lengthy discovery proceedings, a trial was held from March 30 to April 22, 1970, and on April 13, 1972, the District Court issued an opinion and judgment finding no violation of the Clayton Act. 341 F. Supp. 534. The Government appealed directly to this Court pursuant to the Expediting Act, 15 U. S. C. § 29, and we noted probable jurisdiction. 409 U. S. 1058.

I

At the time of the acquisition involved here, Material Service Corp. was a large midwest producer and supplier of building materials, concrete, limestone, and coal. All of its coal production was from deep-shaft mines operated by it or its affiliate, appellee Freeman Coal Mining Corp., and production from these operations

amounted to 6.9 million tons of coal in 1959 and 8.4 million tons in 1967. In 1954, Material Service began to acquire the stock of United Electric Coal Companies. United Electric at all relevant times operated only strip or open-pit mines in Illinois and Kentucky; at the time of trial in 1970 a number of its mines had closed and its operations had been reduced to four mines in Illinois and none in Kentucky.[1] In 1959, it produced 3.6 million tons of coal, and by 1967, it had increased this output to 5.7 million tons. Material Service's purchase of United Electric stock continued until 1959. At this point Material's holdings amounted to more than 34% of United Electric's outstanding shares and—all parties are now agreed on this point—Material had effective control of United Electric. The president of Freeman was elected chairman of United Electric's executive committee, and other changes in the corporate structure of United Electric were made at the behest of Material Service.

Some months after this takeover, Material Service was itself acquired by the appellee General Dynamics Corp. General Dynamics is a large diversified corporation, much of its revenues coming from sales of aircraft, communications, and marine products to Government agencies. The trial court found that its purchase of Material Service was part of a broad diversification program aimed at expanding General Dynamics into commercial, nondefense business. As a result of the purchase of Material Service, and through it, of Freeman and United Electric, General Dynamics became the Nation's fifth largest commercial coal producer. During the early 1960's General Dynamics increased its equity in United

[1] United Electric also had coal-mining operations in Utah and other Western States. The Government has not contended, however, that these holdings are of any relevance in this case.

Electric by direct purchases of United Electric stock, and by 1966 it held or controlled 66.15% of United Electric's outstanding shares. In September 1966 the board of directors of General Dynamics authorized a tender offer to holders of the remaining United Electric stock. This offer was successful, and United Electric shortly thereafter became a wholly owned subsidiary of General Dynamics.

The thrust of the Government's complaint was that the acquisition of United Electric by Material Service in 1959 violated § 7 of the Clayton Act [2] because the takeover substantially lessened competition in the production and sale of coal in either or both of two geographic markets. It contended that a relevant "section of the country" within the meaning of § 7 was, alternatively, the State of Illinois or the Eastern Interior Coal Province Sales Area, the latter being one of four major coal distribution areas recognized by the coal industry and comprising Illinois and Indiana, and parts of Kentucky, Tennessee, Iowa, Minnesota, Wisconsin, and Missouri.[3]

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[2] Section 7 of the Clayton Act reads in pertinent part as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[3] Testimony at trial indicated that the Eastern Interior Coal Province—the area of coal production upon which the Eastern Coal Province Sales Area was based—was originally named by United States Geological Survey maps of the coalfields in the United States and described one portion of a sequence of coal-bearing rock formations known geologically as the Pennsylvania System. The Sales Area of the Eastern Interior Coal Province was derived from the

At trial controversy focused on three basic issues: the propriety of coal as a "line of commerce," the definition of Illinois or the Eastern Interior Coal Province Sales Area as a relevant "section of the country," and the probability of a lessening of competition within these or any other product and geographic markets resulting from the acquisition. The District Court decided against the Government on each of these issues.

As to the relevant product market, the court found that coal faced strong and direct competition from other sources of energy such as oil, natural gas, nuclear energy, and geothermal power which created a cross-elasticity of demand among those various fuels. As a result, it concluded that coal, by itself, was not a permissible product market and that the "energy market" was the sole "line of commerce" in which anticompetitive effects could properly be canvassed.

Similarly, the District Court rejected the Government's proposed geographic markets on the ground that they were "based essentially on past and present production statistics and do not relate to actual coal consumption patterns." 341 F. Supp., at 556. The court found that a realistic geographic market should be defined in terms of transportation arteries and freight charges that determined the cost of delivered coal to purchasers and thus the competitive position of various coal producers. In particular, it found that freight rate districts, designated by the Interstate Commerce Commission for determining rail transportation rates, of which there were four in the area served by the appellee companies, were the prime determinants for the

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assumption, acknowledged in the trial court's opinion, that the high costs of transporting coal—which may amount to 40% of the price of delivered coal—will inevitably give producers of coal a clear competitive advantage in sales in the immediate areas of the mines.

geographic competitive patterns among coal producers. In addition, the court concluded that two large and specialized coal consumption units were sufficiently differentiable in their coal use patterns to be included as relevant geographic areas.[4] In lieu of the State of Illinois or the Eastern Interior Coal Province Sales Area, the court accordingly found the relevant geographic market to be 10 smaller areas, comprising the two unique consumers together with four utility sales areas and four nonutility sales areas based on the ICC freight rate districts.

Finally, and for purposes of this appeal most significantly, the District Court found that the evidence did not support the Government's contention that the 1959 acquisition of United Electric substantially lessened competition in any product or geographic market. This conclusion was based on four determinations made in the court's opinion, *id.*, at 558–559. First, the court noted that while the number of coal producers in the Eastern Interior Coal Province declined from 144 to 39 during the period of 1957–1967, this reduction "occurred not because small producers have been acquired by others, but as the inevitable result of the change in

[4] The trial court found that Commonwealth Edison, a large private electric utility with generation facilities in many parts of Illinois, and the Metropolitan Chicago Interstate Air Quality Control Region constituted separate and unique geographic regions. Commonwealth Edison was found to have unique attributes because of the great size of its coal consumption requirements, its distinctive distribution patterns, and its extensive commitment to air pollution programs and the development of nuclear energy. The Chicago Control Region, a congressionally designated area consisting of six counties in Illinois and two in Indiana, was distinguished from other geographic markets because of the impact of existing and anticipated air pollution regulations which would create special problems in the competition for coal sales contracts. 341 F. Supp. 534, 557.

the nature of demand for coal." Consequently, the court found, "this litigation presents a very different situation from that in such cases as United States v. Philadelphia National Bank, 374 U. S. 321 (1963), and United States v. Von's Grocery Co., 384 U. S. 270 (1966), where the Supreme Court was concerned with 'preventing even slight increases in concentration.' 374 U. S., at 365, n. 2." 341 F. Supp., at 558. Second, the court noted that United Electric and Freeman were "predominantly complementary in nature" since "United Electric is a strip mining company with no experience in deep mining nor likelihood of acquiring it [and] Freeman is a deep mining company with no experience or expertise in strip mining." *Ibid.* Third, the court found that if Commonwealth Edison, a large investor-owned public utility, were excluded, "none of the sales by United Electric in the period 1965 to 1967, the years chosen by the Government for analysis, would have or could have been competitive with Freeman, had the two companies been independent," because of relative distances from potential consumers and the resultant impact on relative competitive position. *Ibid.* Finally, the court found that United Electric's coal reserves were so low that its potential to compete with other coal producers in the future was far weaker than the aggregate production statistics relied on by the Government might otherwise have indicated. In particular, the court found that virtually all of United Electric's proved coal reserves were either depleted or already committed by long-term contracts with large customers, and that United Electric's power to affect the price of coal was thus severely limited and steadily diminishing. On the basis of these considerations, the court concluded: "Under these circumstances, continuation of the affiliation between United Electric and Freeman is not adverse

to competition, nor would divestiture benefit competition even were this court to accept the Government's unrealistic product and geographic market definitions." *Id.*, at 560.

II

The Government sought to prove a violation of § 7 of the Clayton Act principally through statistics showing that within certain geographic markets the coal industry was concentrated among a small number of large producers; that this concentration was increasing; and that the acquisition of United Electric would materially enlarge the market share of the acquiring company and thereby contribute to the trend toward concentration.

The concentration of the coal market in Illinois and, alternatively, in the Eastern Interior Coal Province was demonstrated by a table of the shares of the largest two, four, and 10 coal-producing firms in each of these areas for both 1957 and 1967 that revealed the following: [5]

	Eastern Interior Coal Province		Illinois	
	1957	1967	1957	1967
Top 2 firms.....	29.6	48.6	37.8	52.9
Top 4 firms.....	43.0	62.9	54.5	75.2
Top 10 firms.....	65.5	91.4	84.0	98.0

These statistics, the Government argued, showed not only that the coal industry was concentrated among a small number of leading producers, but that the trend had been toward increasing concentration.[6] Furthermore, the un-

[5] The figures for 1967 reflect the impact on market concentration of the acquisition involved here.

[6] The figures demonstrating the degree of concentration in the two coal markets chosen by the Government were roughly comparable to those in *United States* v. *Von's Grocery Co.*, 384 U. S. 270, where

disputed fact that the number of coal-producing firms in Illinois decreased almost 73% during the period of 1957 to 1967 from 144 to 39 was claimed to be indicative of the same trend. The acquisition of United Electric by Material Service resulted in increased concentration of coal sales among the leading producers in the areas chosen by the Government, as shown by the following table: [7]

	1959			1967		
	Share of top 2 but for merger	Share of top 2 given merger	Percent increase	Share of top 2 but for merger	Share of top 2 given merger	Percent increase
Province	33.1	37.9	14.5	45.0	48.6	8.0
Illinois	36.6	44.3	22.4	44.0	52.9	20.2

Finally, the Government's statistics indicated that the acquisition increased the share of the merged company

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the top four firms in the market controlled 24.4% of the sales, the top eight 40.9%, and the top 12 48.8%. See *id.*, at 281 (WHITE, J., concurring). See also *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 551, where the top four producers of beer in Wisconsin were found to control 47.74% of the market, and the top 10 in the Nation and the local three-state area to control 45.06% and 58.93%, respectively. The statistics in the present case appear to represent a less advanced state of concentration than those involved in *United States* v. *Aluminum Co. of America*, 377 U. S. 271, 279, where the two largest firms held 50% of the market, and the top five and the top nine controlled, respectively, 76% and 95.7%; and in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 365, where the two largest banks controlled 44% of the pre-merger market.

[7] The percentage increase in concentration asserted here was thus analogous to that found in *Von's Grocery, supra*, where the concentration among the top four, eight, and 12 firms was increased, respectively, by 18.0%, 7.6%, and 2.5% as a result of the merger invalidated there. In *Philadelphia Bank, supra*, the 34% increase in concentration in the two largest firms from 44% to 59% was found to be clearly significant. 374 U. S., at 365.

in the Illinois and Eastern Interior Coal Province coal markets by significant degrees: [8]

	Province		Illinois	
	Rank	Share (percent)	Rank	Share (percent)
1959				
Freeman	2	7.6	2	15.1
United Electric	6	4.8	5	8.1
Combined	2	12.4	1	23.2
1967				
Freeman	5	6.5	2	12.9
United Electric	9	4.4	6	8.9
Combined	2	10.9	2	21.8

In prior decisions involving horizontal mergers between competitors, this Court has found prima facie violations of § 7 of the Clayton Act from aggregate statistics of the sort relied on by the United States in this case. In *Brown Shoe Co.* v. *United States*, 370 U. S. 294, the Court reviewed the legislative history of the most recent amendments to the Act and found that "[t]he dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.*, at 315. A year later, in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, the Court clarified the relevance of a statistical demonstration of concentration in a particular industry and of the effects

[8] The 1959 Illinois figure of 23.2% was asserted by the Government to be comparable to the 23.94% share of the Wisconsin beer market found to be significant in *Pabst*, *supra*, and the 25% share controlled by the merged company in *United States* v. *Continental Can Co.*, 378 U. S. 441, 461. The Province figure of 12.4% was compared with the shares held by the merged companies in *Von's Grocery* (7.5%), and in the *Pabst* national (4.49%) and three-state (11.32%) markets.

thereupon of a merger or acquisition with the following language:

> "This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.*, at 363.

See also *United States* v. *Continental Can Co.*, 378 U. S. 441, 458; *United States* v. *Von's Grocery Co.*, 384 U. S., at 277; *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 550–552.

The effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing, since "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Aluminum Co. of America*, 377 U. S. 271, 279, citing *United States* v. *Philadelphia National Bank*, *supra*, at 365 n. 42.

While the statistical showing proffered by the Government in this case, the accuracy of which was not discredited by the District Court or contested by the appellees, would under this approach have sufficed to

support a finding of "undue concentration" in the absence of other considerations, the question before us is whether the District Court was justified in finding that other pertinent factors affecting the coal industry and the business of the appellees mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition of United Electric. We are satisfied that the court's ultimate finding was not in error.

In *Brown Shoe* v. *United States, supra,* we cautioned that statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects:

> "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry." 370 U. S., at 321–322.
>
> "Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Id.,* at 322 n. 38.

See also *United States* v. *Continental Can Co., supra,* at 458. In this case, the District Court assessed the evidence of the "structure, history and probable future" of the coal industry, and on the basis of this assessment found no substantial probability of anticompetitive effects from the merger.

Much of the District Court's opinion was devoted to a description of the changes that have affected the coal industry since World War II. On the basis of more than three weeks of testimony and a voluminous record, the court discerned a number of clear and significant devel-

opments in the industry. First, it found that coal had become increasingly less able to compete with other sources of energy in many segments of the energy market. Following the War the industry entirely lost its largest single purchaser of coal—the railroads—and faced increasingly stiffer competition from oil and natural gas as sources of energy for industrial and residential uses. Because of these changes in consumption patterns, coal's share of the energy resources consumed in this country fell from 78.4% in 1920 to 21.4% in 1968. The court reviewed evidence attributing this decline not only to the changing relative economies of alternative fuels and to new distribution and consumption patterns, but also to more recent concern with the effect of coal use on the environment and consequent regulation of the extent and means of such coal consumption.

Second, the court found that to a growing extent since 1954, the electric utility industry has become the mainstay of coal consumption. While electric utilities consumed only 15.76% of the coal produced nationally in 1947, their share of total consumption increased every year thereafter, and in 1968 amounted to more than 59% of all the coal consumed throughout the Nation.[9]

Third, and most significantly, the court found that to an increasing degree, nearly all coal sold to utilities is transferred under long-term requirements contracts, under which coal producers promise to meet utilities' coal consumption requirements for a fixed period of time, and at predetermined prices. The court described the mutual benefits accruing to both producers and consumers of

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[9] In 1968, electric utilities accounted for 59.09% of United States coal consumption, coke plants 18.20%, cement mills 1.88%, other manufacturing (including steel and rolling mills) 17.70%, and retail and miscellaneous consumers 3.14%.

coal from such long-term contracts in the following terms:

> "This major investment [in electric utility equipment] can be jeopardized by a disruption in the supply of coal. Utilities are, therefore, concerned with assuring the supply of coal to such a plant over its life. In addition, utilities desire to establish in advance, as closely as possible, what fuel costs will be for the life of the plant. For these reasons, utilities typically arrange long-term contracts for all or at least a major portion of the total fuel requirements for the life of the plant. . . .
>
> "The long-term contractual commitments are not only required from the consumer's standpoint, but are also necessary from the viewpoint of the coal supplier. Such commitments may require the development of new mining capacity. . . . Coal producers have been reluctant to invest in new mining capacity in the absence of long-term contractual commitments for the major portion of the mine's capacity. Furthermore, such long-term contractual commitments are often required before financing for the development of new capacity can be obtained by the producer." 341 F. Supp., at 543 (footnote omitted).

These developments in the patterns of coal distribution and consumption, the District Court found, have limited the amounts of coal immediately available for "spot" purchases on the open market, since "[t]he growing practice by coal producers of expanding mine capacity only to meet long-term contractual commitments and the gradual disappearance of the small truck mines has tended to limit the production capacity available for spot sales." *Ibid.*

Because of these fundamental changes in the structure of the market for coal, the District Court was justified in viewing the statistics relied on by the Government as insufficient to sustain its case. Evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete. In most situations, of course, the unstated assumption is that a company that has maintained a certain share of a market in the recent past will be in a position to do so in the immediate future. Thus, companies that have controlled sufficiently large shares of a concentrated market are barred from merger by § 7, not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor. In markets involving groceries or beer, as in *Von's Grocery, supra,* and *Pabst, supra,* statistics involving annual sales naturally indicate the power of each company to compete in the future. Evidence of the amount of annual sales is relevant as a prediction of future competitive strength, since in most markets distribution systems and brand recognition are such significant factors that one may reasonably suppose that a company which has attracted a given number of sales will retain that competitive strength.

In the coal market, as analyzed by the District Court, however, statistical evidence of coal *production* was of considerably less significance. The bulk of the coal produced is delivered under long-term requirements contracts, and such sales thus do not represent the exercise of competitive power but rather the obligation to fulfill previously negotiated contracts at a previously fixed price. The focus of competition in a given time frame is not on the disposition of coal already produced but on the procurement of new long-term supply contracts. In this situation, a company's

past ability to produce is of limited significance, since it is in a position to offer for sale neither its past production nor the bulk of the coal it is presently capable of producing, which is typically already committed under a long-term supply contract. A more significant indicator of a company's power effectively to compete with other companies lies in the state of a company's uncommitted reserves of recoverable coal. A company with relatively large supplies of coal which are not already under contract to a consumer will have a more important influence upon competition in the contemporaneous negotiation of supply contracts than a firm with small reserves, even though the latter may presently produce a greater tonnage of coal. In a market where the availability and price of coal are set by long-term contracts rather than immediate or short-term purchases and sales, reserves rather than past production are the best measure of a company's ability to compete.

The testimony and exhibits in the District Court revealed that United Electric's coal reserve prospects were "unpromising." 341 F. Supp., at 559. United's relative position of strength in reserves was considerably weaker than its past and current ability to produce. While United ranked fifth among Illinois coal producers in terms of annual production, it was 10th in reserve holdings, and controlled less than 1% of the reserves held by coal producers in Illinois, Indiana, and western Kentucky. *Id.*, at 538. Many of the reserves held by United had already been depleted at the time of trial, forcing the closing of some of United's midwest mines.[10]

[10] The District Court found that while United Electric held six mines operating in the midwest in 1948, it had opened only three new ones since then and four had closed because of exhaustion of reserves. The court found that the evidence showed that reserves in two other mines would soon be depleted, and the appellees inform us in their briefs that these events have already occurred.

Even more significantly, the District Court found that of the 52,033,304 tons of currently mineable reserves in Illinois, Indiana, and Kentucky controlled by United, only four million tons had not already been committed under long-term contracts. United was found to be facing the future with relatively depleted resources at its disposal, and with the vast majority of those resources already committed under contracts allowing no further adjustment in price. In addition, the District Court found that "United Electric has neither the possibility of acquiring more [reserves] nor the ability to develop deep coal reserves," and thus was not in a position to increase its reserves to replace those already depleted or committed. *Id.*, at 560.

Viewed in terms of present and future reserve prospects—and thus in terms of probable future ability to compete—rather than in terms of past production, the District Court held that United Electric was a far less significant factor in the coal market than the Government contended or the production statistics seemed to indicate. While the company had been and remained a "highly profitable" and efficient producer of relatively large amounts of coal, its current and future power to compete for subsequent long-term contracts was severely limited by its scarce uncommitted resources.[11] Irrespective of the company's size when viewed as a producer, its weakness as a competitor was properly

[11] As an example of the impact of depleted or committed reserves on a company's ability to compete for long-term contracts, the District Court noted that a number of requirements contracts signed by United Electric to supply coal to electric utilities were backed up by reserves belonging to Freeman and *"could not have been obtained without that guarantee"* because of the utilities' fear that the contract obligation could not otherwise be fulfilled. 341 F. Supp., at 559 (emphasis in original).

analyzed by the District Court and fully substantiated that court's conclusion that its acquisition by Material Service would not "substantially . . . lessen competition . . . ." The validity of this conclusion is not undermined, we think, by the three-faceted attack made upon it by the Government in this Court—to which we now turn.

III

First, the Government urges that the court committed legal error by giving undue consideration to facts occurring after the effective acquisition in 1959.[12] In *FTC* v. *Consolidated Foods Corp.*, 380 U. S. 592, 598, this Court stated that postacquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a § 7 case. See also *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 597 *et seq.*, 602 *et seq.* But in *Consolidated Foods, supra,* and in *United States* v. *Continental Can Co.*, 378 U. S., at 463, the probative value of such evidence was found to be extremely limited, and judgments against the Government were in each instance reversed in part because "too much weight" had been given to postacquisition events. The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions

[12] The court's reliance on such facts and the absence of specific findings of fact concerning the competitive situation in 1959, at which point both sides now agree the acquisition took place, may have been engendered by the Government's apparent inconsistency in its position concerning the critical date. Certain of the appellees' proposed findings of fact concerning United Electric's resources in 1959 and its attempts to increase its depleted holdings were termed "irrelevant" by the Government at the trial.

merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.[13]

Furthermore, the fact that no concrete anticompetitive symptoms have occurred does not itself imply that competition has not already been affected, "for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger." *FTC* v. *Consolidated Foods, supra,* at 598. And, most significantly, § 7 deals in "probabilities, not certainties," *Brown Shoe* v. *United States,* 370 U. S., at 323, and the mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial.

[13] The mere nonoccurrence of anticompetitive effects from a merger would, of course, merely postpone rather than preclude a divestiture suit. This Court indicated in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 597, that a merger may be attacked *ab initio* long after its culmination if effect on competition not apparent immediately after the merger subsequently appears, since § 7 was designed to arrest the creation of monopolies "'in their incipiency'" and "'incipiency' . . . denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. . . ." See also *FTC* v. *Consolidated Foods Corp.*, 380 U. S. 592, 598. The scope this "time of suit" concept gives to the Government in attacking mergers under § 7 is discussed in Orrick, The Clayton Act: Then and Now, 24 ABA Antitrust Section 44 (1964); Subcommittee on Section 7, The Backward Sweep Theory and the Oligopoly Problem, 32 ABA Antitrust L. J. 306 (1966). In the context of the present case, the "time of suit" rule coupled with the limited weight given to post-merger evidence of no anticompetitive impact tends to give the Government a "heads-I-win, tails-you-lose" advantage over a § 7 defendant: post-merger evidence showing a lessening of competition may constitute an "incipiency" on which to base a divestiture suit, but evidence showing that such lessening has not, in fact, occurred cannot be accorded "too much weight."

In this case, the District Court relied on evidence relating to changes in the patterns and structure of the coal industry and in United Electric's coal reserve situation after the time of acquisition in 1959. Such evidence could not reflect a positive decision on the part of the merged companies to deliberately but temporarily refrain from anticompetitive actions, nor could it reasonably be thought to reflect less active competition than that which might have occurred had there not been an acquisition in 1959. As the District Court convincingly found, the trend toward increased dependence on utilities as consumers of coal and toward the near-exclusive use of long-term contracts was the product of inevitable pressures on the coal industry in all parts of the country. And, unlike evidence showing only that no lessening of competition has yet occurred, the demonstration of weak coal resources necessarily and logically implied that United Electric was not merely disinclined but unable to compete effectively for future contracts. Such evidence went directly to the question of whether future lessening of competition was probable, and the District Court was fully justified in using it.

Second, the Government contends that reliance on depleted and committed resources is essentially a "failing company" defense which must meet the strict limits placed on that defense by this Court's decisions in *United States* v. *Third National Bank in Nashville*, 390 U. S. 171; *Citizen Publishing Co.* v. *United States*, 394 U. S. 131; and *United States* v. *Greater Buffalo Press*, 402 U. S. 549. The failing-company doctrine, recognized as a valid defense to a § 7 suit in *Brown Shoe*, *supra*, at 346, was first announced by this Court in *International Shoe Co.* v. *FTC*, 280 U. S. 291, and was preserved by explicit references in the legislative history of the modern amendments to § 7. H. R. Rep. No. 1191, 81st Cong., 1st Sess., 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess.,

7 (1950). A company invoking the defense has the burden [14] of showing that its "resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure . . . ," *International Shoe, supra,* at 302, and further that it tried and failed to merge with a company other than the acquiring one, *Citizen Publishing Co., supra,* at 138; *Greater Buffalo Press, supra,* at 555.

The Government asserts that United Electric was a healthy and thriving company at the time of the acquisition and could not be considered on the brink of failure, and also that the appellees have not shown that Material Service was the only available acquiring company. These considerations would be significant if the District Court had found no violation of § 7 by reason of United Electric's being a failing company, but the District Court's conclusion was not, as the Government suggests, identical with or even analogous to such a finding. The failing-company defense presupposes that the effect on competition and the "loss to [the company's] stockholders and injury to the communities where its plants were operated," *International Shoe, supra,* at 302, will be less if a company continues to exist even as a party to a merger than if it disappears entirely from the market. It is, in a sense, a "lesser of two evils" approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business.[15]

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[14] In *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 138–139, "[t]he burden of proving that the conditions of the failing company doctrine have been satisfied" was found to be "on those who seek refuge under it." (Footnote omitted.)

[15] Alternative rationales for the failing-company defense are discussed in Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 339–347 (1960); Com-

The appellees' demonstration of United's weak reserves position, however, proved an entirely different point. Rather than showing that United would have gone out of business but for the merger with Material Service, the finding of inadequate reserves went to the heart of the Government's statistical prima facie case based on production figures and substantiated the District Court's conclusion that United Electric, even if it remained in the market, did not have sufficient reserves to compete effectively for long-term contracts. The failing-company defense is simply inapposite to this finding and the failure of the appellees to meet the prerequisites of that doctrine did not detract from the validity of the court's analysis.

Finally, the Government contends that the factual underpinning of the District Court's opinion was not supported by the evidence contained in the record, and should be re-evaluated by this Court. The findings and conclusions of the District Court are, of course, governed by the "clearly erroneous" standard of Fed. Rule Civ. Proc. 52 (a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals. The record in this case contains thousands of pages of transcript and hundreds of exhibits. Little purpose would be served by discussing in detail each of the Government's specific factual contentions. Suffice it to say that we find the controlling findings and conclusions contained in the District Court's careful and lengthy opinion to be supported by the evidence in the record and not clearly erroneous.

One factual claim by the Government, however, goes to the heart of the reasoning of the District Court and thus is worthy of explicit note here. The Government

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ment, "Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers, 68 Yale L. J. 1627, 1662–1668 (1959).

asserts that the paucity of United Electric's coal reserves could not have the significance perceived by the District Court, since all companies engaged in extracting minerals at some point deplete their reserves and then acquire new reserves or the new technology required to extract more minerals from their existing holdings. United Electric, the Government suggests, could at any point either purchase new strip reserves or acquire the expertise to recover currently held deep reserves.

But the District Court specifically found new strip reserves not to be available: "Evidence was presented at trial by experts, by state officials, by industry witnesses and by the Government itself indicating that economically mineable strip reserves that would permit United Electric to continue operations beyond the life of its present mines are not available. The Government failed to come forward with any evidence that such reserves are *presently* available." 341 F. Supp., at 559. In addition, there was considerable testimony at trial, apparently credited by the District Court, indicating that United Electric and others had tried to find additional strip reserves not already held for coal production, and had been largely unable to do so.

Moreover, the hypothetical possibility that United Electric might in the future acquire the expertise to mine deep reserves proves nothing—or too much. As the Government pointed out in its brief and at oral argument, in recent years a number of companies with no prior experience in extracting coal have purchased coal reserves and entered the coal production business in order to diversify and complement their current operations. The mere possibility that United Electric, in common with all other companies with the inclination and the corporate treasury to do so, could some day expand into an essentially new line of business does not depreciate the validity of

the conclusion that United Electric at the time of the trial did not have the power to compete on a significant scale for the procurement of future long-term contracts, nor does it vest in the production statistics relied on by the Government more significance than ascribed to them by the District Court.

IV

In addition to contending that the District Court erred in finding that the acquisition of United Electric would not substantially lessen competition, the Government urges us to review the court's determinations of the proper product and geographic markets. The Government suggests that while the "energy market" might have been *an* appropriate "line of commerce," coal also had sufficient "practical indicia" as a separate "line of commerce" to qualify as an independent and consistent submarket. Cf. *United States* v. *Continental Can Co.*, 378 U. S., at 456–457. It also suggests that irrespective of the validity of the criteria adopted by the District Court in selecting its 10 geographic markets, competition between United Electric and Material Service within the larger alternative geographic markets claimed by the Government established those areas as a permissible "section of the country" within the meaning of § 7.

While under normal circumstances a delineation of proper geographic and product markets is a necessary precondition to assessment of the probabilities of a substantial effect on competition within them, in this case we nevertheless affirm the District Court's judgment without reaching these questions. By determining that the amount and availability of usable reserves, and not the past annual production figures relied on by the Government, were the proper indicators of future ability to compete, the District Court wholly rejected the Govern-

ment's prima facie case. Irrespective of the markets within which the acquiring and the acquired company might be viewed as competitors for purposes of this § 7 suit, the Government's statistical presentation simply did not establish that a substantial lessening of competition was likely to occur in any market. By concluding that "divestiture [would not] benefit competition even were this court to accept the Government's unrealistic product and geographic market definitions," 341 F. Supp., at 560, the District Court rendered superfluous its further determinations that the Government also erred in its choice of relevant markets. Since we agree with the District Court that the Government's reliance on production statistics in the context of this case was insufficient, it follows that the judgment before us may be affirmed without reaching the issues of geographic and product markets.

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concur, dissenting.

In this case the United States appeals from a District Court decision [1] upholding the acquisition of stock in United Electric Coal Companies by Material Service Corp. and its successor, General Dynamics Corp., against a challenge that the acquisition violated § 7 of the Clayton Act, 15 U. S. C. § 18.[2] The United States instituted

[1] 341 F. Supp. 534 (1972).

[2] Title 15 U. S. C. § 18 provides:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of

this civil antitrust action on the claim that the acquisition may substantially lessen competition in the Illinois and Eastern Interior Coal Province (EICP) sales area coal markets. After trial on the merits the District Court rejected the Government's proposed product and geographic markets and dismissed the action, concluding that the Government had failed to show a substantial lessening of competition in the markets the court deemed relevant.

I

The combination here challenged is the union of two major Illinois coal producers—Freeman Coal Mining Corp. and United Electric Coal Companies—under the ultimate corporate control of General Dynamics Corp. Material Service Corp. acquired all the stock of Freeman Coal in 1942 and began to acquire United Electric stock in 1954. By 1959, holdings in United reached 34%, and Material Service requested and received representation on United's board of directors. As a result, Freeman's president was elected chairman of United's executive committee. "With the affiliation of Freeman and United Electric thus formalized in 1959, common control of the two coal companies was achieved." 341 F. Supp. 534, 537 (1972).

General Dynamics acquired Material Service Corp. in 1959 and moved to solidify the union of Freeman and United by engaging in continued purchases of United's stock throughout the early 1960's. By 1966 it held nearly two-thirds of United's outstanding shares and a successful tender offer increased the holdings to over 90%. In early 1967 United became a wholly owned subsidiary of

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another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

General Dynamics. With the 1959 union of Freeman and United Electric thus completed, the Government filed this action challenging the legality of the combination which produced in General Dynamics the Nation's fifth largest coal producer with total annual production of over 14 million tons.

II

Section 7 of the Clayton Act, the standard against which this combination must be tested, proscribes such combinations "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition . . . ." [3] "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act . . . ." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593 (1957). The court below concluded that "the energy market is the appropriate line of commerce for testing the competitive effect of the United Electric-Freeman combination." 341 F. Supp., at 555. The court rejected the Government's hypothesis of coal as a submarket for antitrust purposes as "untenable," finding that *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964), "compel[s] this court to conclude that since coal competes with gas, oil, uranium and other forms of energy, the relevant line of commerce must encompass interfuel competition." 341 F. Supp., at 556.

I read *Continental Can* to import no such compulsion. That case involved the acquisition of the Nation's third largest producer of glass containers, Hazel-Atlas Glass Co., by Continental Can, the country's second largest producer of metal containers. The District Court found interindustry competition an insufficient predicate for finding a § 7 line of commerce embracing both cans and

[3] *Supra*, n. 2.

bottles. We reversed, finding that interindustry competition mandated "treating as *a* relevant product market the combined glass and metal container industries and all end uses for which they compete." 378 U. S., at 457 (emphasis added). But that interindustry market was only one of several lines of commerce in that case. Both parties conceded that "the can industry and the glass container industry were relevant lines of commerce." *Id.*, at 447. Since § 7 proscribes acquisitions which may involve a substantial lessening of competition in *any* line of commerce, the absence of anticompetitive effects in either the bottle or can markets could not sustain the acquisition since there existed *a* market—the glass/metal container market given recognition in this Court—in which the prohibited effect was present.

The District Court here found an energy market in which the combination did not work the prohibited effect. Whatever the correctness of that finding, *Continental Can* teaches us that it is of no help to appellees if there exist other lines of commerce in which the effect is present. Any combination may involve myriad lines of commerce; the existence of an energy market is not inconsistent with and does not negate the existence of a narrower coal market for "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 325 (1962).

This principle found recognition in *Continental Can* where we recognized glass and metal containers "to be two separate lines of commerce," despite finding that competition between the lines "necessarily implied one or more *other* lines of commerce embracing both industries." 378 U. S., at 456–457 (emphasis added). It was also recognized in *United States* v. *Aluminum Co. of America*, 377 U. S. 271 (1964), which involved the com-

bination of an aluminum conductor manufacturer and a producer of both aluminum and copper conductor. The District Court there refused to treat aluminum conductor as a separate § 7 line of commerce because of the competition between aluminum and copper conductor. Though we found that competition sufficient to justify finding a single aluminum/copper conductor market, we reversed the District Court, holding that the interindustry competition did not preclude "division [of that market] for purposes of § 7 into separate submarkets." *Id.*, at 275.[4]

Coal has both price advantages and operational disadvantages which combine to delineate within the energy market "economically significant submarket[s]."[5] The consumers for whom price is determinative mark out a submarket in which coal is the overwhelming choice; the boundaries of this submarket are strengthened by coal's virtual inability to compete in other significant sectors of the energy market. Energy-use technology in highway and air transportation necessitates the use of liquid fuels. The relative operational ease of dieselized power plants has worked to virtually foreclose coal from the rail transportation market.[6] Despite their higher cost, gas and oil enjoy a competitive edge in the space-heating market because of simple consumer preference for these sources of energy over coal.[7]

The market for coal is therefore effectively limited to large industrial energy consumers such as electric utilities and certain manufacturers with the ability and economic

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[4] Similarly, in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963), we held commercial banking a § 7 line of commerce even though banks compete with other institutions with respect to some services such as the making of small loans.

[5] See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 325 (1962).

[6] 341 F. Supp., at 539.

[7] *Ibid.*

incentive to consider coal as an energy source.[8] The court below noted that the "utility market has become the mainstay of coal production." 341 F. Supp., at 539. Within this sector coal's economic advantage yields it an overwhelming share of the market. In each year from 1960 to 1967 (the period during which the Freeman-United Electric union solidified) coal accounted for over 90% of the B.t.u.'s consumed by steam electric utility plants in the EICP sales area; it also provided 74% of the B.t.u.'s consumed by cement plants in the same area and 94% of the B.t.u.'s consumed by such plants in Illinois.[9]

The coal market is therefore viewed by energy consumers as a separate economic entity confined to those users with the technological capability to allow the use of coal and the incentive for economy to mandate it. Within that market coal experiences little competition from other fuels since coal's delivered price per B.t.u. in the areas served by Freeman and United Electric is significantly lower than that for any other combustible fuel except interruptible natural gas which is available only on a seasonal basis.[10] Central Illinois Light Co., for example, purchases coal at 27 cents per million B.t.u.'s,

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[8] The only other significant use for coal is metallurgical in nature. Metallurgical coal is used as a product in the manufacture of steel. The use of such coal as a product sets it off in a separate market from nonmetallurgical coal which is used as an energy source.

[9] Although nuclear and geothermal power may draw some utility consumers from the coal market in the future, nuclear fuel is not consumable in existing fossil-fuel plants nor is nuclear fuel presently an alternative for nonutility coal consumers. Thus, whatever the future inroads of alternative fuels, there remains a significant class of energy consumers which looks only to coal.

[10] Interruptible gas is sold at a lower rate and is available only when it is not required by firm-rate customers which are supplied according to their needs and which always have priority.

firm natural gas at 45 cents, and oil (for ignition purposes) at 70 cents.[11] Since coal consumption facilities are unique and not readily adaptable to alternative energy sources, there is little interfuel price sensitivity. As the court in *Kennecott Copper Corp.* v. *FTC*, 467 F. 2d 67, 79 (CA10 1972), stated in finding that "[t]he coal industry is a distinct submarket which has characteristics which are not shared by the other fuel industries," coal prices "are now, and promise to be in the future, subject to the peculiarities of the coal business [since] other fuels appear to have a limited effect."

The competitive position of coal is thus not unlike that of aluminum conductor in *United States* v. *Aluminum Co. of America, supra.* Like coal, aluminum conductor had "little consumer acceptance" for many purposes, but its substantial price advantage over other conductors gave it "decisive advantages" in those areas of the market where price was "the single, most important, practical factor." 377 U. S., at 275–276. Despite the existence of some competition from other forms of conductor, those factors were sufficient to set aluminum conductor apart as an economically significant § 7 submarket. That precedent seems to be indistinguishable; and thus whatever the existence of a § 7 energy market, coal constitutes an economically significant submarket for § 7 purposes.[12]

III

In rejecting the Government's proposed geographic markets the court below adopted much narrower mar-

[11] Oil is used by some coal consumers for purposes to which coal is not suited such as starting up boilers or kilns.

[12] Even the court below gave some recognition to coal as a separate market in its discussion of the relevant geographic markets. The geographic markets were delineated along "the distributive patterns of . . . coal," separating out those "mines to which *coal* consumers can practicably turn for supplies." 341 F. Supp., at 556 (emphasis added).

kets which, for the most part, followed ICC freight rate districts (FRD's).[13] The justification was that, since ordinary rail rates are the same for all mines in any particular FRD and since transportation costs are the principal competitive factor in coal marketing, mines in one FRD cannot effectively compete for the same customers with mines in other FRD's. Since United Electric's mines are located in the Belleville and Fulton-Peoria FRD's and Freeman's mines are located in the Springfield and Southern Illinois FRD's, the combination of the two companies was found to present no risk of anticompetitive effects.

The error of the District Court in drawing the § 7 sections of the country "so narrowly as to place appellees in different markets"[14] is amply demonstrated by the overlapping distribution patterns of Freeman and United Electric. Though located in different FRD's and thus supposedly not competitive, they sold one-half their output to the same customers at the same facilities. Lack of competition between FRD's is further refuted by the existence of reciprocal selling patterns. For example,

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[13] Freight rate districts are producing areas grouped for ICC rate-making purposes; all mines within each producing area are accorded the same rates to the same consuming destinations. See *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573, 576 (1949). The other markets accepted by the District Court are Commonwealth Edison and the Metropolitan Chicago Interstate Air Quality Control Region. Commonwealth Edison was found to be unique in light of its massive coal requirements, its purchasing patterns which are "quite distinct from [those] followed by other consumers," and its singularly extensive commitment to nuclear energy. The MCIAQC, consisting of six Northeastern Illinois counties and two Northwestern Indiana counties, was found unique because of its singular access, through water and rail arteries, to almost all FRD's in the Midwest.

[14] See *United States* v. *Philadelphia National Bank*, 374 U. S., at 361.

while United's Belleville FRD mine was selling 25% of its output to customers in the Southern Illinois FRD sales area, Freeman was selling 20% of its Southern Illinois FRD coal to Belleville sales area customers.

The inability of the lower court's narrow markets to " 'correspond to the commercial realities' " [15] of the distribution patterns displayed in the record is explained by the undue weight given ordinary rail rates. While transportation costs are significant, ordinary rail rates are not the single controlling element of transportation costs. First, not all rail shipments are governed by FRD rates; many of the most significant shipments are transported via "unit trains" carrying only coal from a particular producer to a particular customer pursuant to a negotiated rate. Thus Freeman ships Southern Illinois FRD coal by unit train to a Belleville FRD sales area customer at a cost *lower* than any Belleville FRD rate to that location. Second, not all coal transportation proceeds by rail. United transports most of its coal by barge, and in 1967 only one-half of all the coal sold in the five States which receive coal from Illinois was transported by all-rail shipments.

Normal rail rates are thus not so limiting as to eliminate substantial competition between FRD sales areas. Coal producers may constitute strong competitive factors in areas up to 500 miles from the mine. Thus in 1967 Freeman's Southern Illinois FRD Orient Mine shipped over 1.5 million tons of coal to customers 300 to 500 miles away. At the same time, United's Fidelity Mine, only 40 miles from the Orient, shipped more than one million tons, over half its total production, to equally distant locations. Both Freeman and United Electric have mines which are capable of supplying any point in the EICP sales area.

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[15] See *Brown Shoe Co.* v. *United States*, 370 U. S., at 336.

Further, even assuming the existence of FRD markets, I think the court below erred in rejecting the Government's proposed markets. As with product markets, § 7 does not necessitate an anticompetitive effect in any particular geographic market; its proscription reaches combinations which may substantially lessen competition in *any* section of the country. Thus, whatever the correctness of the District Court in finding FRD markets, the lack of anticompetitive effect in those markets is of no help to General Dynamics if competition may be lessened substantially in other geographic markets. And, as with product markets, the existence of FRD markets is not inconsistent with the existence of a myriad of other sometimes overlapping markets. Thus, in *United States* v. *Pabst Brewing Co.*, 384 U. S. 546 (1966), we found Wisconsin, the Wisconsin-Michigan-Illinois tristate area, and the entire United States all to be relevant § 7 sections of the country in which to assess anticompetitive impact.

While existing sales patterns show that transportation costs are not as restrictive as the District Court found, long-range transportation costs and the national distribution of coal deposits serve to divide the country into regionally significant coal markets. Both Freeman and United Electric are located in the EICP, consisting of Central and Southern Illinois, Southwestern Indiana, and Western Kentucky, and parts of other nearby areas. The region overlies a geologically united coal-bearing rock sequence which is estimated to contain 36% of the Nation's total coal resources. Because of the separation of the region from other major producing regions,[16]

[16] The Nation's other major coal producing regions are: (1) the Eastern Coal Province of Western Pennsylvania, West Virginia, Eastern Kentucky, and parts of Ohio, Tennessee, and Alabama; (2) the Western Interior Coal Province comprised of Central Iowa, Northern and Western Missouri, and Eastern Oklahoma; and (3) scat-

EICP producers enjoy a substantial competitive edge with respect to sales in an area composed of Illinois, Indiana, Western Kentucky, parts of Tennessee, Eastern Iowa, Southeastern Minnesota, Southern Wisconsin, and extreme Eastern Missouri. In 1967, 82% of EICP coal was sold in this area. Freeman sold over 93% of its coal and United Electric sold over 97% of its coal in this area.

Within the EICP sales area, Illinois stands as an economically significant submarket. In 1967, 82% of the coal consumed in Illinois came from Illinois mines and 58% of the coal mined in the State was used there. Freeman sold 42% of its coal and United Electric sold 62% of its coal to Illinois consumers, more than either company sold in any other State. Since Illinois sales are dominated by Illinois producers and since all relevant Freeman and United Electric Mines are located in Illinois,[17] the State constitutes a relevant and significant market for § 7 purposes. Although economic lines do not fall precisely along political boundaries, the Government is not required to delineate § 7 markets by "metes and bounds." *United States* v. *Pabst Brewing, supra,* at 549. In holding a four-county group a relevant geographic market in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963), we noted the artificiality of such political boundaries but held that "such fuzziness would seem inherent in any attempt to delineate the relevant geographic market." *Id.*, at 360 n. 37. The State of Wisconsin was held a relevant market in *Pabst Brewing, supra,* and in *United States* v. *El Paso Gas Co.*, 376 U. S. 651, 657 (1964), we held that there could be "no

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tered deposits in Montana, Wyoming, Colorado, and Utah. Jurisdictional Statement 5.

[17] United Electric also controls some coal deposits in Colorado and Oklahoma which are not in issue in this case. 341 F. Supp., at 538 n. 8.

doubt that California is a 'section of the country' as that phrase is used in § 7."

IV

While finding no violation of § 7 in the Freeman-United Electric combination, the District Court did not make clear the standard used in reaching that ultimate conclusion. The court did not mention what it thought to be the relevant market shares nor did it discuss the effect of the combination on industry concentration. The court merely found that Freeman and United Electric do not compete because they are located in different FRD geographic markets, and because they sell different types of coal. As already discussed, nearly all the mines of both companies are located in Southern Illinois, and as demonstrated by past distribution patterns, with an ability to compete effectively at distances up to 500 miles, their presence in different minute FRD's within Southern Illinois has simply *not* rendered them noncompetitive. The differences in the types of coal sold, moreover, are irrelevant. It is true, as the court below notes, that United Electric sells strip-mined coal while Freeman extracts deep reserves, but the fact that the companies sold half their output to common customers demonstrates that at least a significant portion of the consuming public is understandably unconcerned with the details of extraction. While it is also true that only Freeman sells metallurgical coal and a byproduct known as dust, this says nothing more than that the companies do not compete in metallurgical coal or dust; it does not relieve the court of the responsibility for evaluating the anticompetitive effects in nonmetallurgical coal production—production which accounts for 100% of United's and 92% of Freeman's business.[18]

[18] The lack of competition from United for a mere 8% of Freeman's business is simply irrelevant. In *United States* v. *Aluminum*

The court further found that United Electric, standing alone, would not contribute meaningfully to further competition since virtually all its economically mineable strip reserves were committed under long-term contracts and it possessed neither the capability to obtain more strip reserves nor the expertise to develop its deep reserves. Although the doctrine was not invoked by name, this appears to be an application of the "failing company" defense. See *Citizen Publishing Co.* v. *United States*, 394 U. S. 131 (1969). If it is, the court proceeded on an analysis made at the wrong time and failed to discuss the legal standards employed in finding the defense to be established. The finding that 48 of United's 52 million tons of strip reserves were committed related to the time of trial. But, since the rationale of the failing-company defense is the lack of anticompetitive consequence if one of the combining companies was about to disappear from the market at any rate, the viability of the "failing company" must be assessed as of the time of the merger. *United States* v. *Greater Buffalo Press*, 402 U. S. 549, 555 (1971); *Citizen Publishing Co.* v. *United States, supra*, at 138.

The Court urges that United's weak reserve position, rather than establishing a failing-company defense, "went to the heart of the Government's statistical prima facie case based on production figures." Under this view United's weak reserve position at the time of trial constitutes postacquisition evidence which diminishes the possibility of anticompetitive impact and thus directly affects the strength of time-of-acquisition findings. The problem

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Co. of America, 377 U. S. 271 (1964), we struck down a combination which affected competition in the aluminum conductor market, and that result was not affected by the irrelevant fact that one of the companies, Rome Cable, also engaged in the production of copper conductor.

with this analysis is that the District Court made no time-of-acquisition findings which such postacquisition evidence could affect. The majority concedes the obvious need for a limitation on the weight given postacquisition evidence and notes that we have reversed cases where "too much weight" has been given. Here the postacquisition events were given *all* the weight because *all* the District Court's findings were made as of the time of the trial. While findings made as of the time of the merger could concededly be tempered to a limited degree by postacquisition events, no such findings were ever made.

Many of the commitments here which reduced United's available reserves occurred after the acquisition; 21 million tons for example were committed in 1968. Similarly, though the District Court found further mineable strip reserves unavailable at the time of trial, there is no finding that they were unavailable in 1959 or 1967. To the contrary, the record demonstrates that other coal producers did acquire new strip reserves during the 1960's.[19] United's 1959 viability is further supported by the fact that it possessed 27 million tons of deep reserves. While we do not know if all these reserves were economically mineable at the time of the acquisition, there was no finding that they would not become so in the near future with advances in technology or changes in the price structure of the coal market.[20] Further there was no contention or finding that further deep reserves were not available for acquisition.[21] The District Court

[19] See Brief for United States 71.

[20] Research into new methods of extraction or a rise in the price of coal could make reserves which are uneconomical to mine at any given time economically mineable in the future.

[21] To the contrary, United Electric acquired substantial new deep reserves after the time of the acquisition since it now owns about 44 million tons of deep reserves and controls by location another 40 to 50 million tons. Reserves are controlled by location if, in

merely concluded that United had no "ability to develop deep coal reserves." [22]

While it is true that United is a strip-mining company which has not extracted deep reserves since 1954, this does not mean that United would not develop deep-mining expertise if deep reserves were all it had left or that it could not sell the reserves to some company which poses less of a threat to increased concentration in the coal market than does Freeman. United Electric was not, as the Court suggests, merely one of many companies with the possible "inclination and the corporate treasury" to allow expansion into "an essentially new line of business." United was a coal company with a thriving coal-marketing structure. At the time of the merger it had access to at least 27 million tons of deep reserves and it had operated a deep mine only five years previously. While deep-coal mining may have been an essentially new line of business for many, it was for United merely a matter of regaining the expertise it once had to extract reserves it already owned for sale in a market where it already had a good name.

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order to be mined at all, they must be mined by those who control, by ownership, lease, or option, the contiguous reserves.

[22] If that conclusion is to lend support to the combination on the ground that United "standing alone, cannot contribute meaningfully to competition," it must be made in light of the stringent standards applicable to the failing-company defense. In *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 138–139 (1969), we said that the defense is one of "narrow scope" and that the burden of proving the defense is "on those who seek refuge under it." We also stated that the prospects of continued independent existence must be "dim or nonexistent" and that it must be established that the acquiring company is the only available purchaser. See also *United States* v. *Greater Buffalo Press*, 402 U. S. 549, 555–556 (1971), and *United States* v. *Third National Bank in Nashville*, 390 U. S. 171, 189 (1968).

V

Thus, from product and geographic markets to market-share and industry-concentration analysis to the failing-company defense, the findings below are based on legal standards which are either incorrect or not disclosed. While the court did gratuitously state that no § 7 violation would be found "even were this court to accept the Government's unrealistic product and market definitions," this conclusory statement is supported by no analysis sufficient to allow review in this Court. The majority notes that production figures are of limited significance because they include deliveries under long-term contracts entered into in prior years. It is true that uncommitted reserves or sales of previously uncommitted coal would be preferable indicia of competitive strength, but the District Court made *no* findings as to United's or Freeman's respective market shares at the time of the acquisition under either of these standards.[23]

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[23] The District Court did find that, as of 1968, Freeman controlled 6.5% of the total coal reserves dedicated to existing mines in the EICP. At the same time, United Electric controlled 2.5% of that total, but almost all of this was contractually committed. If market shares are to be determined by percentage of total reserves, what is necessary is a finding as to each company's 1959 share of uncommitted Illinois and EICP reserves—including reserves which were economically mineable or which might have become so in the reasonably near future and further including an estimate as to uncontrolled reserves which might have been acquired by either company in the reasonably near future.

The District Court also found that, as of 1968, the two companies together accounted for 10.9% of the EICP coal production, and that this figure represented more than a 10% decrease from the combined production for 1959. Combined 1959 production by the companies was thus at least 12.1% of the EICP total. If market shares are to be determined by percentage of industry sales, this figure is in excess of percentages found illegal in markets with a trend toward concentration (see, *e. g.*, *United States* v. *Von's Grocery Co.*, 384 U. S. 270

On the basis of a record so devoid of findings based on correct legal standards, the judgment may not be affirmed except on a deep-seated judicial bias against § 7 of the Clayton Act. We should remand the case to the District Court with directions to assess the impact of the Freeman-United Electric combination on the Illinois and EICP sales area coal markets as of 1959.[24] We should direct the court to make findings of respective market shares, and further to evaluate United Electric's viability as an independent producer or as the possible "acquiree" of a company other than General Dynamics as of 1959, in light of the strict standards applicable to the failing-company defense. Since we abdicate our duty for responsible review and accept the mere conclusion that no § 7 violation is established on the basis of a record with none of these necessary findings, I dissent from the affirmance of the District Court's judgment.

(1966) (7.5%), and *United States* v. *Pabst Brewing Co.*, 384 U. S. 546 (1966) (4.49%)), and the court below recognized an increase in concentration in the coal market. It might be argued, however, that, if market share is to be determined by sales, the production figures found by the court below are not the relevant ones for they include production which goes to meet obligations incurred in long-term contracts entered into in prior years. In terms of competition, if sales are the relevant criteria, what is needed is a finding of "new" sales (sales of previously uncommitted coal) as a percentage of total industry new sales in Illinois and the EICP at the time of the acquisition.

[24] Common control of the two companies was achieved in 1959 and the combination was completed in 1967; at oral argument both parties conceded that the merger "took place" in 1959.

HAGANS ET AL. *v.* LAVINE, COMMISSIONER, NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72–6476. Argued December 11, 1973—
Decided March 25, 1974

Petitioners, recipients of public assistance under the federal-state Aid to Families with Dependent Children (AFDC) program, brought this action under 42 U. S. C. § 1983 and 28 U. S. C. § 2201 challenging a New York regulation permitting the State to recoup prior unscheduled payments for rent from subsequent grants under the AFDC program, on the ground that the regulation violated the Equal Protection Clause of the Fourteenth Amendment and conflicted with the Social Security Act and implementing regulations of the Department of Health, Education, and Welfare (HEW). Injunctive and declaratory relief was sought and jurisdiction was invoked under 28 U. S. C. §§ 1343 (3) and (4). The District Court declared the recoupment regulation contrary to the Social Security Act and HEW regulations and enjoined its implementation or enforcement. The Court of Appeals reversed, holding that because petitioners had failed to present a substantial constitutional claim, the District Court lacked jurisdiction to entertain either the equal protection or the statutory claim. *Held:*

1. The District Court had jurisdiction under 28 U. S. C. § 1343 (3). Pp. 534–543.

(a) Section 1343 (3) conferred jurisdiction to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction, in which case, the District Court could hear as a matter of pendent jurisdiction the claim of conflict between federal and state law, without determining that the latter claim in its own right was encompassed with § 1343. P. 536.

(b) Within the accepted substantiality doctrine, petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy, since (1) the complaint alleged a deprivation, under color of state law, of constitutional rights within the meaning of §§ 1343 (3) and

1983; (2) the equal protection issue was neither frivolous nor so insubstantial as to be beyond the District Court's jurisdiction, and the challenged regulation was not so clearly rational as to require no meaningful consideration; and (3) the cause of action alleged was not so patently without merit as to justify a dismissal for want of jurisdiction, *Bell* v. *Hood*, 327 U. S. 678, whatever may be the ultimate resolution of the federal issues on the merits. Pp. 536–543.

2. Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the "statutory" claim. The latter claim was to be decided first and could be decided by the single district judge, while the constitutional claim could be adjudicated only by a three-judge court and only if the statutory claim was previously rejected. Pp. 543–545.

3. State law claims pendent to federal constitutional claims conferring jurisdiction on a district court generally are not to be dismissed. Given advantages of economy and convenience and no unfairness to litigants, they are to be adjudicated, particularly where they may be dispositive and their decision would avoid adjudication of federal constitutional questions. There are special reasons to adjudicate the pendent claim where, as here, the claim, although called "statutory," is in reality a constitutional claim arising under the Supremacy Clause, since "federal courts are particularly appropriate bodies for the application of pre-emption principles." *Mine Workers* v. *Gibbs*, 383 U. S. 715, 729. Pp. 545–550.

471 F. 2d 347, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 550. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 552.

Carl Jay Nathanson argued the cause for petitioners. With him on the briefs were *Steven J. Cole* and *Henry A. Freedman*.

Michael Colodner, Assistant Attorney General of New York, argued the cause for respondent Lavine. With him on the brief were *Louis J. Lefkowitz*, Attorney Gen-

eral, and *Samuel A. Hirshowitz,* First Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioners, recipients of public assistance under the cooperative federal-state Aid to Families With Dependent Children (AFDC) program,[1] brought this action in the District Court for themselves and their infant children and as representatives of other similarly situated AFDC recipients. Their suit challenged a provision of

[1] AFDC is one of several major categorical public assistance programs established by the Social Security Act of 1935, and as we described in *King* v. *Smith,* 392 U. S. 309, 316–317 (1968), it is founded on a scheme of cooperative federalism:

"It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). 49 Stat. 627, 42 U. S. C. §§ 601, 602, 603, and 604. See [U. S. Advisory Commission Report on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance 21–23 (1964)]. The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW. 49 Stat. 627, as amended, 42 U. S. C. § 602 (1964 ed., Supp. II). See also HEW, Handbook of Public Assistance Administration, pt. IV, §§ 2200, 2300 . . . ."

See also *Rosado* v. *Wyman,* 397 U. S. 397, 407–409 (1970).

Under the Social Security Act, HEW withholds federal funds for implementation of a state AFDC plan until compliance with the Act and the Department's regulations. HEW may also terminate partially or entirely federal payments if "in the administration of the [state] plan there is a failure to comply substantially with any provision required by section 602 (a) of [the Act] to be included in the plan." 42 U. S. C. § 604. See *King* v. *Smith, supra,* at 317 n. 12; *Rosado* v. *Wyman, supra,* at 420–422.

the New York Code of Rules and Regulations permitting the State to recoup prior unscheduled payments for rent from subsequent grants under the AFDC program.[2] They alleged that the recoupment regulation violated the Equal Protection Clause of the Fourteenth Amendment and contravened the pertinent provisions of the Social Security Act governing AFDC and the regulations promulgated thereunder by the administering federal agency, the Department of Health, Education, and Welfare (HEW).[3] The action sought injunctive and declaratory

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[2] The challenged regulation provides, in pertinent part:

"(g) *Payment for services and supplies already received.* Assistance grants shall be made to meet only current needs. Under the following specified circumstances payment for services or supplies already received is deemed a current need:

. . . . . .

"(7) For a recipient of public assistance who is being evicted for nonpayment of rent for which a grant has been previously issued, an advance allowance may be provided to prevent such eviction or rehouse the family; and such advance shall be deducted from subsequent grants in equal amounts over not more than the next six months. When there is a rent advance for more than one month, or more than one rent advance in a 12 month period, subsequent grants for rent shall be provided as restricted payments in accordance with Part 381 of this Title." 18 N. Y. C. R. R. § 352.7 (g) (7).

As AFDC recipients, petitioners receive monthly grants calculated to provide 90% of their family needs for shelter, fuel, and other basic necessities. For one reason or another, each petitioner was unable to pay her rent, and faced with imminent eviction, she received emergency rent payments from the Nassau County Department of Social Services. Because the State characterized these payments as "advances," the amount of these disbursements was deducted or recouped from petitioners' subsequent monthly familial assistance grants pursuant to § 352.7 (g) (7).

[3] Petitioners alleged that the New York State recoupment regulation was contrary to the following provisions of the federal statute and regulations because it assumed, contrary to fact, that those funds, extended to a recipient to satisfy a current emergency rent need,

relief pursuant to 42 U. S. C. § 1983 and 28 U. S. C. § 2201, and jurisdiction was invoked under 28 U. S. C. §§ 1343 (3) and (4). The District Court found that the equal protection claim was substantial and provided a basis for pendent jurisdiction to adjudicate the so-called "statutory" claim—the alleged conflict between state and federal law. After hearing, the trial court declared the recoupment regulation contrary to the Social Security Act and HEW regulations and enjoined its implementa-

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remain available as income for the family's need during the mandated six-month recoupment period.

Title 42 U. S. C. §§ 602 (a)(7) and (a)(10) state in pertinent part:

"(a) A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), provide that the [administering] State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income . . . .

. . . . . .

"(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . . ."

45 CFR § 233.20 (a)(3)(ii)(c):

"(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

. . . . . .

"(3) . . . .

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: . . . (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered . . . ."

tion or enforcement. Following a remand,[4] the Court of Appeals reversed, holding that because petitioners had failed to present a substantial constitutional claim, the District Court lacked jurisdiction to entertain either the equal protection or the statutory claim. 471 F. 2d 347 (CA2 1973). The jurisdictional question being an important one, we granted certiorari. 412 U. S. 938 (1973). For reasons set forth below, we hold that the District Court had jurisdiction under 28 U. S. C. § 1343 (3) to consider petitioners' attack on the recoupment regulation.[5]

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[4] On appeal from the District Court's entry of the injunction, the Court of Appeals without extended discussion found jurisdiction for the § 1983 action under 28 U. S. C. § 1343 (3). Without passing on the merits of the District Court's findings and conclusions, the Court of Appeals, with one judge dissenting, ordered a remand to that court to determine whether the recoupment of prior advance rent payments from current grants is a "reduction in grant" that would trigger the New York fair-hearing procedures under 18 N. Y. C. R. R. § 351.26. 462 F. 2d 928 (CA2 1972).

On remand, the District Court allowed additional parties who had received fair hearings to intervene and file a complaint. At the invitation of the court, HEW filed an *amicus curiae* brief which concluded that "the New York regulation does contravene federal requirements because it assumes for particular months the existence of income and resources which by definition are not currently available for such months." Brief for Petitioners Appendix 2. The District Court once again held the recoupment regulation invalid as violative of the Social Security Act and HEW regulations and enjoined its enforcement and implementation.

[5] In view of our disposition of this case, we do not reach the question whether, wholly aside from the pendent-jurisdiction rationale relied upon by the District Court, other valid grounds existed for sustaining its jurisdiction to entertain and decide the claim of conflict between federal and state law. It has been suggested, for example, that the conflict question is itself a constitutional matter within the meaning of § 1343 (3). *Connecticut Union of Welfare Employees* v. *White*, 55 F. R. D. 481, 486 (Conn. 1972). For purposes of interpreting and applying 28 U. S. C. § 2281, the three-judge-court provision, a claim of conflict between federal and state

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Petitioners brought this action under 42 U. S. C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

law has been denominated a claim not requiring a three-judge court. *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965). But *Swift* itself recognized that a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution—"to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." *Id.*, at 125. Moreover, when we have previously determined that state AFDC laws do not conform to the Social Security Act or HEW regulations, they have been invalidated under the Supremacy Clause. See *Townsend* v. *Swank*, 404 U. S. 282, 286 (1971). It is therefore urged that the "secured by the Constitution" language of § 1343 (3) should not be construed to exclude Supremacy Clause issues. That question we leave for another day.

Petitioners contend that § 1983 authorizes suits to vindicate rights under the "laws" of the United States as well as under the Constitution and that a suit brought under § 1983 to vindicate a statutory right under the Social Security Act, is a suit under an Act of Congress "providing for the protection of civil rights, including the right to vote" within the meaning of § 1343 (4). They further argue that in any event, § 1343 (3) in particular, and § 1343 in general, should be construed to invest the district courts with jurisdiction to hear any suit authorized by § 1983. These issues we also do not reach. See *Rosado* v. *Wyman*, 397 U. S., at 405 n. 7; see also Herzer, Federal Jurisdiction Over Statutorily-Based Welfare Claims, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 16–18 (1970); Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 Col. L. Rev. 1404, 1405–1435 (1972); Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84, 109–115 (1967).

Several past decisions of this Court concerning challenges by federal categorical assistance recipients to state welfare regulations have either assumed that jurisdiction existed under § 1343 or so

> or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

By its terms, § 1983 embraces petitioners' claims that the challenged regulation enforced by respondent state and county welfare officials deprives them of a right "secured by the Constitution and laws," *viz.*, the equal protection of the laws. But the federal cause of action created by the section does not by itself confer jurisdiction upon the federal district courts to adjudicate these claims. Accordingly, petitioners relied principally upon 28 U. S. C. § 1343 (3):

> "The district courts shall have original jurisdic-

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stated without analysis. See, *e. g.*, *Carleson* v. *Remillard*, 406 U. S. 598 (1972); *Carter* v. *Stanton*, 405 U. S. 669, 671 (1972); *Townsend* v. *Swank*, 404 U. S., at 284 n. 2; *California Human Resources Dept.* v. *Java*, 402 U. S. 121 (1971); *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *King* v. *Smith*, 392 U. S., at 312 n. 3; *Damico* v. *California*, 389 U. S. 416 (1967). In none of these cases was the jurisdictional issue squarely raised as a contention in the petitions for certiorari, jurisdictional statements, or briefs filed in this Court. See *Edelman* v. *Jordan*, *post*, at 670–671. Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. *United States* v. *More*, 3 Cranch 159, 172 (1805); *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 134–135, n. 21 (1928) (Brandeis, J., dissenting). We therefore approach the question of the District Court's jurisdiction to entertain this suit as an open one calling for a canvass of the relevant jurisdictional considerations. *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U. S. 73, 88 (1960) (Frankfurter, J., dissenting).

tion of any civil action authorized by law to be commenced by any person:

. . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

Concededly, § 1343 authorizes a civil action to "redress the deprivation, under color of any State . . . regulation . . . of any right . . . secured by the Constitution of the United States." Section 1343 (3) therefore conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction. If it was, it is also clear that the District Court could hear as a matter of pendent jurisdiction the claim of conflict between federal and state law, without determining that the latter claim in its own right was encompassed within § 1343. *Rosado* v. *Wyman*, 397 U. S. 397, 402–405 (1970); see also *N. Y. Dept. of Social Services* v. *Dublino*, 413 U. S. 405, 412 n. 11 (1973).

The Court of Appeals ruled that petitioners had not tendered a substantial constitutional claim and ordered dismissal of the entire action for want of subject matter jurisdiction. The principle applied by the Court of Appeals—that a "substantial" question was necessary to support jurisdiction—was unexceptionable under prior cases. Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co.* v. *Newburyport*, 193

U. S. 561, 579 (1904); "wholly insubstantial," *Bailey* v. *Patterson,* 369 U. S. 31, 33 (1962); "obviously frivolous," *Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285, 288 (1910); "plainly unsubstantial," *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105 (1933); or "no longer open to discussion," *McGilvra* v. *Ross,* 215 U. S. 70, 80 (1909). One of the principal decisions on the subject, *Ex parte Poresky,* 290 U. S. 30, 31–32 (1933), held, first, that "[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented"; second, that a three-judge court was not necessary to pass upon this initial question of jurisdiction; and third, that "[t]he question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Levering & Garrigues Co.* v. *Morrin, supra; Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285, 288; *McGilvra* v. *Ross,* 215 U. S. 70, 80."

Only recently this Court again reviewed this general question where it arose in the context of convening a three-judge court under 28 U. S. C. § 2281:

> " 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey* v. *Patterson,* 369 U. S., at 33; 'wholly insubstantial,' *ibid.;* 'obviously frivolous,' *Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285, 288 (1910); and 'obviously without merit,' *Ex parte Poresky,* 290 U. S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitu-

> tionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281. A claim is insubstantial only if ' "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ' *Ex parte Poresky, supra,* at 32, quoting from *Hannis Distilling Co.* v. *Baltimore, supra,* at 288; see also *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105–106 (1933); *McGilvra* v. *Ross,* 215 U. S. 70, 80 (1909)." *Goosby* v. *Osser,* 409 U. S. 512, 518 (1973).

The substantiality doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims has been questioned, *Bell* v. *Hood,* 327 U. S. 678, 683 (1946), and characterized as "more ancient than analytically sound," *Rosado* v. *Wyman, supra,* at 404. But it remains the federal rule and needs no re-examination here, for we are convinced that within accepted doctrine petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy.

Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other. *The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25 (1913). Here, §§ 1343 (3) and 1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law, of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter for threshold determination, turned

on whether the question was too insubstantial for consideration.

In *Dandridge* v. *Williams*, 397 U. S. 471 (1970), AFDC recipients challenged the Maryland maximum grant regulation on equal protection grounds. We held that the issue should be resolved by inquiring whether the classification had a rational basis. Finding that it did, we sustained the regulation. But *Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still "be rationally based and free from invidious discrimination." *Id.*, at 487. See *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972); *Carter* v. *Stanton*, 405 U. S. 669, 671 (1972); cf. *San Antonio School District* v. *Rodriguez*, 411 U. S. 1 (1973).

Judged by this standard, we cannot say that the equal protection issue tendered by the complaint was either frivolous or so insubstantial as to be beyond the jurisdiction of the District Court. We are unaware of any cases in this Court specifically dealing with this or any similar regulation and settling the matter one way or the other.[6] Nor is it immediately obvious to us from the

[6] Those district courts that have ruled on similarly drafted state recoupment provisions have found that they were not rationally related to the declared purposes of the AFDC program and were therefore invalid under the Social Security Act and HEW regulations. In *Cooper* v. *Laupheimer*, 316 F. Supp. 264 (ED Pa. 1970), the District Court, after finding the equal protection claim substantial, invalidated a Pennsylvania regulation that recouped over a two-month period alleged overpayments from a family's assistance grants. The court found the regulation inconsistent with the Social Security Act for several reasons, including, *inter alia*, the punishment of the dependent child by depriving him of a substantial amount of his AFDC assistance because his mother either mistakenly or fraudulently obtained an extra payment months ago. "[T]he state cannot justify its [arbitrary] method of restitution by asserting that proper management of funds would produce such a

face of the complaint that recouping emergency rent payments from future welfare disbursements, which petitioners argue deprived needy children because of parental

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[cash] reserve. The state cannot permit a child to starve or be deprived of aid that he needs because of the mother's budgetary mismanagement. The Social Security Act specifies remedies for such a situation . . . ." *Id.*, at 269.

In *Bradford* v. *Juras*, 331 F. Supp. 167 (Ore. 1971), the District Court found that it had subject-matter jurisdiction over the constitutional and statutory challenge to an Oregon regulation authorizing recoupment of overpayments from current assistance grants. Measuring the regulation against the goals of the AFDC program, the court invalidated it as inconsistent with federal law.

"The primary concern of Congress in establishing the AFDC program was the welfare and protection of the needy dependent child. 42 U. S. C. § 601; King v. Smith, 392 U. S. 309, 313 . . . (1968). This concern is thwarted when recoupment from current grants takes money from the child to penalize the misconduct of its parent.

. . . . . .

". . . The child-oriented policy of the AFDC program requires that children with equal needs be treated equally. The fact that a parent-recipient has acted wrongfully in the past by withholding information does not justify reducing the subsistence level of her children below that of other needy children." 331 F. Supp., at 170.

In *Holloway* v. *Parham*, 340 F. Supp. 336 (ND Ga. 1972), an equal protection and due process challenge to a Georgia statute mandating recoupment from future grants for past unlawful payments was deemed substantial enough to warrant the convening of a three-judge court. Addressing the pendent claim of inconsistency with the Social Security Act and HEW regulations, the court ruled that the law was valid because it required a prerecoupment determination that all or part of the overpayments are currently available to the parent and the children.

Although it did not explore the question in depth, the first Court of Appeals panel in this case that passed upon the injunction found jurisdiction in the District Court pursuant to 28 U. S. C. § 1343 (3) on the authority of the Court's decision in *Carter* v. *Stanton*, 405 U. S. 669 (1972). There we noted in a suit challenging a state welfare regulation that "if the [federal district] court's characterization of the [Fourteenth Amendment] question presented as insubstantial was based on the face of the complaint, as it seems to have been, it was

default, was so patently rational as to require no meaningful consideration.

The Court of Appeals rightly felt obliged to measure petitioners' complaint that the challenged regulation violated the Equal Protection Clause "by discriminating irrationally and invidiously between different classes of recipients" [7] against the standard prescribed by *Dandridge*. The Court of Appeals then reasoned that without the recoupment regulation, those who were subject to it would be preferred over those who had paid their full rent out of their normal monthly grant. The court further reasoned that the regulation provided an incentive for welfare recipients to properly manage their grants and not become delinquent in their rent.[8] It concluded that

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error." *Id.*, at 671. The dissent did not question the majority's jurisdictional determination. 462 F. 2d, at 930–931, 932.

[7] App. 5.

[8] "The regulation in question, 18 NYCRR § 352.7 (g)(7), has a rational basis. Since the state has a limited amount of funds available to allocate to welfare recipients, the recoupment regulation is reasonably designed to ensure that there are sufficient funds available to all recipients on the level set by the state legislature. By receiving the advance payment plaintiffs have gotten more than the normal grant. Without the recoupment regulation, the plaintiffs would be in a preferred position over all the other welfare recipients who have paid their full rent out of the normal grant. The purposes of equal protection are served by treating all alike without granting special favor to those who have misappropriated their rent allowance. If there were no recoupment provision, there would be a disincentive for welfare recipients to manage their grants so as to have funds available to pay their rent each month. The recoupment provision encourages proper money management, an entirely acceptable, if incidental, purpose of the welfare legislation.

"No doubt there are other ways in which the state could accomplish the ends served by the use of the recoupment regulation. However it is not for us to evaluate the wisdom of the state's choice of means. If these means are rationally related to a proper end, as they are in this case, we have no power to go further." 471 F. 2d 347, 349–350.

the regulation was rationally based and that no substantial constitutional question within the jurisdiction of the District Court had been presented.

This reasoning with respect to the rationality of the regulation and its propriety under the Equal Protection Clause may ultimately prove correct, but it is not immediately obvious from the decided cases or so "very plain" [9] under the Equal Protection Clause. We think the admonition of *Bell* v. *Hood*, 327 U. S. 678 (1946), should be followed here:

> "Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." *Id.*, at 682 (citations omitted).[10]

As was the case in *Bell* v. *Hood*, we cannot "say that the cause of action alleged is so patently without merit

[9] *Hart* v. *Keith Exchange*, 262 U. S. 271, 274 (1923).

[10] Once a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not "insubstantial on their face," *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U. S. 423, 428 (1966), "no further consideration of the merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter." *Baker* v. *Carr*, 369 U. S. 186, 199 (1962).

as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction." *Id.*, at 683. Nor can we say that petitioners' claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 666–667 (1974). (Citations omitted.)

II

Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the "statutory" claim. See *supra*, at 536. The latter was to be decided first and the former not reached if the statutory claim was dispositive. *California Human Resources Dept.* v. *Java*, 402 U. S. 121, 124 (1971); *Dandridge* v. *Williams*, 397 U. S., at 475–476; *Rosado* v. *Wyman*, 397 U. S., at 402; *King* v. *Smith*, 392 U. S. 309 (1968). The constitutional claim could be adjudicated only by a three-judge court, but the statutory claim was within the jurisdiction of a single district judge. *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965); *Rosado* v. *Wyman*, *supra*, at 403. Thus, the District Judge, sitting alone, moved directly to the statutory claim. His decision was appealed to the Court of Appeals, although had a three-judge court been convened, an injunction issued, and the statutory ground alone decided, the appeal would be only to this Court under 28 U. S. C. § 1253.

The procedure followed by the District Court—initial determination of substantiality and then adjudication of the "statutory" claim without convening a three-judge court—may appear at odds with some of our prior decisions. See, *e. g.*, *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U. S. 423 (1966); *Florida Lime & Avocado Grow-*

ers v. *Jacobsen*, 362 U. S. 73 (1960). But, we think it accurately reflects the recent evolution of three-judge-court jurisprudence, "this Court's concern for efficient operation of the lower federal courts," and "the constrictive view of the three-judge [court] jurisdiction which this Court has traditionally taken." *Swift & Co.* v. *Wickham, supra*, at 128, 129 (citations omitted). In *Rosado* v. *Wyman, supra*, at 403, we suggested that

> "[e]ven had the constitutional claim not been declared moot, the most appropriate course may well have been to remand to the single district judge for findings and the determination of the statutory claim rather than encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court. See *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965)."

It is true that the constitutional claim would warrant convening a three-judge court and that if a single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue. Nevertheless, the coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which, in view of what we have said in *Rosado* v. *Wyman, supra*, could then merely pass the statutory claim back to the single judge. See *Kelly* v. *Illinois Bell Telephone Co.*, 325 F. 2d 148, 151 (CA7 1963); *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, 319–320 (CA6 1958); *Doe* v. *Lavine*, 347 F. Supp. 357, 359–360 (SDNY 1972); cf. *Bryant* v. *Carleson*, 444 F. 2d 353, 358–359 (CA9 1971). "In fact, it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is especially

apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court." *Norton* v. *Richardson,* 352 F. Supp. 596, 599 (Md. 1972) (citations omitted). Section 2281 does not forbid this practice, and we are not inclined to read that statute "in isolation with mutilating literalness . . . ." *Florida Lime & Avocado Growers* v. *Jacobsen, supra,* at 94 (Frankfurter, J., dissenting).

III

Taking a jaundiced view of the constitutional claim, the dissenters would have the District Court dismiss the Supremacy Clause ("statutory") issue, convene a three-judge court, and reject the constitutional claim, all of this, apparently, as an exercise of the discretion which the District Court, under *Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966), is claimed to have over the pendent federal claim. But *Gibbs* was oriented to state law claims pendent to federal claims conferring jurisdiction on the District Court. Pendent jurisdiction over state claims was described as a doctrine of discretion not to be routinely exercised without considering the advantages of judicial economy, convenience, and fairness to litigants. For, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.,* at 726 (footnote omitted).[11]

In light of the dissent's treatment of *Gibbs,* several observations are appropriate. First, it is evident from *Gibbs* that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated.

[11] The Court also cited with approval Chief Judge Magruder's concurrence in *Strachman* v. *Palmer,* 177 F. 2d 427, 431 (CA1 1949), advising that "'[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation.'" 383 U. S., at 726 n. 15.

On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of these claims.

Second, it would reasonably follow that other considerations may warrant adjudication rather than dismissal of pendent state claims. In *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909) the Court held that the state issues should be decided first and because these claims were dispositive, federal questions need not be reached:

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record." *Id.*, at 193.

Siler is not an oddity. The Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims. See, *e. g.*, *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298, 303–304, 310 (1913); *Ohio Tax Cases*, 232 U. S. 576, 586–587 (1914); *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 508–509 (1917); *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522, 527 (1917); *Davis* v. *Wallace*, 257 U. S. 478, 482, 485 (1922); *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 97–98 (1924); *Cincinnati* v. *Vester*, 281 U. S. 439, 448–449 (1930); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629 (1946). The doctrine is not ironclad, see *Sterling* v. *Constantin*, 287 U. S. 378, 393–394, 396 (1932), but it is recurringly ap-

plied,[12] and, at the very least, it presumes the advisability of deciding first the pendent, nonconstitutional issue.

Gibbs did not cite *Siler* or like cases, nor did it purport to change the ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available. The dissent uncritically relies on *Siler* but ignores the preference stated in that case for deciding nonconstitutional claims even though they are pendent and, standing alone, are beyond the jurisdiction of the federal court.[13]

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[12] Numerous decisions of this Court have stated the general proposition endorsed in *Siler*—that a federal court properly vested with jurisdiction may pass on the state or local law question without deciding the federal constitutional issues—and have then proceeded to dispose of the case solely on the nonfederal ground. See, *e. g.*, *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629–630 (1946); *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116–119 (1927); *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94 (1924); *United Gas Co.* v. *Railroad Comm'n*, 278 U. S. 300, 308 (1929); *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 387 (1926). These and other cases illustrate in practice the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case. Other decisions have addressed both the federal and state claims in a random fashion, see, *e. g.*, *Atlantic Coast Line R. Co.* v. *Daughton*, 262 U. S. 413, 421–426 (1923); *Southern R. Co.* v. *Watts*, 260 U. S. 519, 525–531 (1923); but they have generally denied relief on both the federal and nonfederal grounds asserted, the nonfederal claim not being dispositive. *Daughton* and *Watts* were both written by Mr. Justice Brandeis, who in his celebrated concurring opinion in *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936), relied upon *Siler* in summarizing the general rule that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."

[13] The dissent also relies upon *Hurn* v. *Oursler*, 289 U. S. 238 (1933), but *Hurn* expressly took account of one aspect of the rule stated in *Siler:* once a federal court acquires jurisdiction of a case by virtue of the federal questions involved, it may omit to decide the federal

Third, the rationale of *Gibbs* centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and the authority to render a final judgment. These considerations favoring state adjudication are wholly irrelevant where the pendent claim is *federal* but is itself beyond the jurisdiction of the District Court for failure to satisfy the amount in controversy. In such cases, the federal court's rendition of federal law will be at least as sure-footed and lasting as any judgment from the state courts.[14]

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issues and decide the case on local or state questions alone. With unmistakable clarity, the Court reaffirmed *Siler:*

"The *Siler* and like cases announce the rule broadly, without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such . . . ." *Id.*, at 245.

The dissent properly notes *Hurn*'s warning that *Siler* does not "permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action . . . ." *Ibid.* However, the *Siler* rule certainly allows the trial court to adjudicate "a case where two distinct *grounds* in support of a single cause of action are alleged, only one of which presents a federal question . . . ." *Id.*, at 246 (emphasis added). We can thus see that here, as in *Hurn*, "[t]he [complaint] alleges the violation of a single right [here the right to nondiscriminatory treatment as to receipt of public assistance]. And it is this violation which constitutes the cause of action. Indeed, the claims of [violation of equal protection and the Social Security Act] so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances. The primary relief sought is an injunction to put an end to an essentially single wrong, however differently characterized, not to enjoin distinct wrongs constituting the basis for independent causes of action." *Id.*, at 246.

See also *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 324–325 (1938).

[14] In a closely analogous context, this Court has recognized the special capability of federal courts to adjudicate pendent federal

The most relevant cases for our purposes, of course, are those decisions such as *King* v. *Smith*, 392 U. S. 309 (1968), *Rosado* v. *Wyman*, 397 U. S. 397 (1970), and *Dandridge* v. *Williams*, 397 U. S. 471 (1970), where the jurisdictional claim arises under the Federal Constitution and the pendent claim, although denominated "statutory," is in reality a constitutional claim arising under the Supremacy Clause. In these cases the Court has characteristically dealt with the "statutory" claim first "because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (Brandeis, J., concurring); *Rosenberg* v. *Fleuti*, 374 U. S. 449." *Dandridge* v. *Williams*, *supra*, at 475–476.

In none of these cases did the Court think that with jurisdiction fairly established, a federal court,

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claims. In *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), an injured Spanish seaman filed suit in federal court claiming damages under the Jones Act and under the general maritime law of the United States for unseaworthiness of the ship, maintenance and cure, and negligence. Jurisdiction was invoked under the Jones Act (46 U. S. C. § 688) and under general federal-question (28 U. S. C. § 1331) and diversity (28 U. S. C. § 1332) jurisdiction. After expressing its view that petitioner alleged a Jones Act claim substantial enough to confer jurisdiction under that statute, the Court held that his general maritime law claims were not cognizable under 28 U. S. C. § 1331. By no means, however, was this the end of the inquiry.

"[T]he District Court may have jurisdiction of [petitioner's general maritime law claims] 'pendent' to its jurisdiction under the Jones Act. Of course the considerations which call for the exercise of pendent jurisdiction of a state claim related to a pending federal cause of action within the appropriate scope of the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238, are not the same when, as here, *what is involved are related claims based on the federal maritime law.* We perceive no barrier to the exercise of 'pendent jurisdiction' in the very limited circumstances before us." 358 U. S., at 380–381 (emphasis added).

under *Gibbs*, must nevertheless decide the constitutional issue and avoid the statutory claim if, upon weighing the two claims, the statutory claim is strong and the constitutional claim weak. On the contrary, Mr. Justice Harlan, writing for the Court in *Rosado* v. *Wyman*, and with the principles of *Gibbs* well in mind, noted that the pendent statutory question was essentially one of federal policy and that the argument for the exercise of pendent jurisdiction was " 'particularly strong.' " 397 U. S., at 404. And *Gibbs* itself observed the "special reason for the exercise of pendent jurisdiction" where the Supremacy Clause is implicated: "the federal courts are particularly appropriate bodies for the application of pre-emption principles." 383 U. S., at 729.

The judgment of the Court of Appeals is reversed and the case remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

I join the dissenting opinion of MR. JUSTICE REHNQUIST because I believe he expresses the correct view of the appropriate result when a claim over which a district court has no independent jurisdiction is appended to a constitutional claim that has no hope of success on the merits. A wise exercise of discretion lies at the heart of the doctrine of pendent jurisdiction. *E. g., Rosado* v. *Wyman*, 397 U. S. 397, 403 (1970); *Mine Workers* v. *Gibbs*, 383 U. S. 715, 726–727 (1966). Compelling a district court to decide an ancillary claim where the premise for its jurisdiction is a meritless constitutional claim does not impress me as an efficacious performance of a discretionary responsibility.

I write briefly to emphasize my view that the majority has misread the import of the *Gibbs* opinion, *supra,* particularly in the manner in which it links *Gibbs* to *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175 (1909), and like cases. *Gibbs* involved a state claim that arose out of the same transaction as the federal law claim that conferred federal jurisdiction. The majority apparently reads *Gibbs* and *Siler* together as mandating decision of the state law claim without regard to the frailty of the federal claim on which federal jurisdiction rests. See *ante,* at 547, 549–550. In other words, the majority opinion appears to be saying that a federal constitutional claim as marginal as the one at issue here is capable of supporting pendent federal jurisdiction over a *state* claim and, indeed, that the state claim is to be decided to the exclusion of the federal issue. As I view it, that is a particularly erroneous interpretation of the pendent jurisdiction doctrine. That reading would broaden federal question jurisdiction to encompass matters of state law whenever an imaginative litigant can think up a federal claim, no matter how insubstantial, that is related to the transaction giving rise to the state claim.

This extension of *Gibbs* is quite unnecessary, since we are not confronted with a case where the pendent claim is a matter of state law. The Court's dictum could nevertheless prompt other courts to follow it. In view of this potential mischief, I repeat a quotation from *Gibbs* relied on by my Brother REHNQUIST which indicates how far the Court has departed from the rationale of that 1966 precedent:

> "[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case.

> Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." 383 U. S., at 727.

The correct reading of *Gibbs*, as a matter of common sense and in light of deeply rooted notions of federalism, is that the federal claim must have more than a glimmer of merit and must continue to do so at least until substantial judicial resources have been committed to the lawsuit. If either of those conditions is not met, a district court has no business deciding issues of state law. District courts are not expositors of state law when jurisdiction is not based on diversity of citizenship.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

The Court's decision in this case resolves a legal question and is necessarily and properly cast in legal terms. According to the Court, a federal district court, having acquired jurisdiction over a "not wholly insubstantial" federal claim, has power to decide other related claims which lack an independent jurisdictional basis. Applying this analysis to the present case, the Court finds the equal protection claim pleaded by petitioners sufficient to satisfy this somewhat hazy definition of "substantiality" and appears to approve the District Court's exercise of pendent jurisdiction over a claim alleging conflict between state and federal welfare regulations. But since we have been admonished that we may not shut our eyes as judges to what we know as men, the practical as well as the legal consequences of this decision should be squarely faced.

In the wake of *King* v. *Smith*, 392 U. S. 309 (1968), and *Rosado* v. *Wyman*, 397 U. S. 397 (1970), the lower federal courts have been confronted by a massive influx of cases challenging state welfare regulations. The principal

claim of plaintiffs in the typical case is that the state regulation conflicts with governing federal regulations and is invalid under the Supremacy Clause of the United States Constitution. This allegation presents a federal claim sufficient to satisfy the first jurisdictional requirement of 28 U. S. C. § 1331,[1] the so-called "federal question" jurisdictional statute, but many plaintiffs find the statute's second requirement, that the matter in controversy exceed the sum of $10,000, impossible to meet. Normally, therefore, these cases would be left, as Congress surely understood when it imposed this jurisdictional limitation, to state courts likewise charged with enforcing the United States Constitution.

To avoid this natural disposition, however, plaintiffs in these cases have turned to 28 U. S. C. § 1343, a more narrowly drawn federal jurisdictional statute requiring no minimum jurisdictional amount. The provision of 28 U. S. C. § 1343 relevant to this case reads:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . . .
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

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[1] The relevant provision of 28 U. S. C. § 1331 reads as follows: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The jurisdictional amount was raised from $3,000 to $10,000 in 1958.

This Court, however, has never held, and does not hold now, that the Supremacy Clause of the Constitution itself provides a basis for jurisdiction under this section. The Court escapes the need for such a decision by granting the federal courts power to hear the Supremacy Clause claim under a theory of pendent jurisdiction. Finding that plaintiffs here have pleaded an equal protection claim sufficiently substantial to satisfy the requirements of 28 U. S. C. § 1343, the Court seems to suggest that consideration of the Supremacy Clause claim may follow as a matter of course. Since I do not believe that the equal protection claim was sufficient to establish jurisdiction under § 1343, or that the doctrine of pendent jurisdiction was appropriately invoked in this case, I dissent.

I

The history of pendent jurisdiction in this Court is long and complex. Its roots go back to *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824), where the Court said that the jurisdiction of the federal courts extended not only to federal issues themselves but also to nonfederal issues essential to the settlement of the federal claim. No subsequent decision has cast any doubt upon the wisdom of Mr. Chief Justice Marshall's exposition in that case, since a different result would have forced substantial federal cases into state courts for adjudication simply because they involved nonfederal issues as well as federal ones.[2] The doctrine was

[2] "Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of

expanded in *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), where the Court upheld the power of a district court, having founded its jurisdiction upon federal constitutional claims, to bypass the constitutional questions and to decide an issue of local law. The Court said that the lower court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." [3] But the Court at the same time cautioned: "Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction." [4]

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the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 822–823 (1824).

[3] 213 U. S., at 191.

[4] *Id.*, at 191–192. In *Siler* the Court specifically noted that the constitutional claim was not fraudulently pleaded to confer jurisdiction over the pendent claim.

The Court today, by its heavy emphasis on deciding state issues in preference to constitutional ones, *ante*, at 546–547, seems to imply that this doctrine should be controlling even when a constitutional claim *is* pleaded "for the mere purpose of endeavoring to give the court jurisdiction." I cannot agree. The numerous cases cited in

The Court returned to the question of pendent jurisdiction in *Hurn* v. *Oursler*, 289 U. S. 238 (1933), and *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103 (1933). The Court in both cases agreed that a substantial federal question was necessary to confer initial jurisdiction on the district court,[5] a test that must be met whether or not pendent jurisdiction is involved, and then in *Hurn* further attempted to define the necessary relationship between the pendent claim and the claim conferring jurisdiction. According to the Court, a lower federal court could exercise pendent jurisdiction over a separate

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the Court's opinion stand for the long-recognized and sensible policy that cases should be decided on nonconstitutional grounds where possible; but they do not stand for the proposition that claims which would be otherwise dismissed under the principles discussed in *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), should be heard simply to avoid the constitutional claim which conferred jurisdiction in the first place. See n. 11, *infra*. In such cases the competing and equally important policy of safeguarding the limited jurisdiction of the federal courts is entitled to more weight than the Court appears to give it.

[5] The Court in *Levering*, *supra*, stated:

"Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. . . . And the federal question averred may be plainly unsubstantial either because obviously without merit, or 'because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" 289 U. S., at 105–106.

ground alleged in support of a single cause of action, but not over a separate cause of action itself.[6]

The Court's most recent extensive treatment of the subject occurred in *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). Because *Hurn* had spoken in terms of "causes of action," a term which was superseded by the adoption of the Federal Rules of Civil Procedure, *Gibbs* redefined the necessary relation of the federal and nonfederal claims in more understandable terms. Restating the substantiality test in pretty much the language of the earlier cases, the Court then continued:

> "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.*, at 725 (footnote omitted) (emphasis in original).

This language served to clarify jurisdictional questions which had proved troublesome after *Hurn* v. *Oursler*. But, importantly, the decision then went on to emphasize

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[6] *Hurn* v. *Oursler*, 289 U. S. 238, 245–246 (1933):

"But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter it may not do so upon the non-federal *cause of action.*" (Emphasis in original.)

that power to hear claims lacking an independent jurisdictional basis should not be exercised indiscriminately. The Court reiterated that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right," *id.*, at 726, and urged that the district courts exercise caution not to abuse that discretion. For example, the Court suggested that

> "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Ibid.* (footnote omitted).

Furthermore, the Court stressed that the relative importance of the claims should be considered:

> "Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." *Id.*, at 726–727.

Although the Court's language in *Gibbs* necessarily discussed the relationship between federal and state claims, much of the opinion's rationale is applicable when pendent jurisdiction is sought over federal claims lacking an independent jurisdictional basis.[7] Of course, a

[7] The Court in *Mine Workers* v. *Gibbs*, 383 U. S., at 727, also stated:

"[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."

I also see no reason why federal courts should be required to "tolerate" efforts to impose upon them federal cases which Congress has chosen to leave to the state courts.

decision to deny pendent jurisdiction on the ground that state courts should consider questions of state law naturally involves issues relevant to the question of abstention, a consideration not especially applicable when the pendent claim primarily involves questions of federal law. But the presence of federal questions should not induce federal courts to expand their proper jurisdiction. As previously noted, Congress, by requiring a minimum dollar amount for federal question jurisdiction, made a legislative decision to leave certain claims to state courts. Considerations of convenience and judicial economy may justify hearing those claims when genuine federal business, as contrasted to weak claims intended merely to secure jurisdiction, is before the federal court, but these considerations should be subordinated to considerations of federalism when the claims without independent jurisdiction constitute "the real body" of the case. In this situation the lower courts should remember that federalism embodies

> "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris,* 401 U. S. 37, 44 (1971).

The majority rejects this analysis, seemingly finding that state courts' greater familiarity with state law is the only reason for declining pendent jurisdiction under *Gibbs*. But Congress left to state courts not only those claims involving state law but also those claims involving federal law which it felt did not merit the time of federal courts. This Court now says that federal courts should hear those cases anyway since they can

render "at least as sure-footed" an interpretation of federal law and are " 'particularly appropriate bodies' " to do so. This opinion, while it undoubtedly reflects the view of this Court, does not reflect with equal accuracy the purpose of Congress.

In *Rosado* v. *Wyman,* 397 U. S. 397 (1970), heavily relied upon by the Court to support its position, there was no intimation that the constitutional claim was a weak one pleaded for the purpose of securing federal jurisdiction over a stronger claim. Rather the constitutional claim proved moot. This Court plainly stated:

> "Unlike insubstantiality, which is apparent at the outset, mootness, frequently a matter beyond the control of the parties, may not occur until after substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court." *Id.,* at 404.

Thus *Rosado* does not in any way settle the issue before the Court today. Its holding offers no aid in resolving the real and practical issues that the Court confronts in this case.

The *Gibbs* decision must be understood in its separate parts. First, the Court held that jurisdiction could not attach unless the claim for which jurisdiction was asserted met the requirement of substantiality and unless the pendent claim was sufficiently related to the jurisdictional claim to constitute a single case under the Constitution. Second, the Court admonished that this jurisdiction, even if found to exist, should be exercised judiciously. The relatively permissive standards applied to the issue of whether the Court *could* consider a pendent claim were not to guide the ultimate decision of whether the Court *should* consider the pendent claim. Only where "considerations of judicial economy, conven-

ience and fairness to litigants" were served and where the pendent claim did not predominate in scope or worth over the judicial claim, was the doctrine of pendent jurisdiction to be applied. 383 U. S., at 726. While I am convinced that the District Court lacked jurisdiction over an equal protection claim as thin as this one, even if I am wrong on that point it seems clear to me that its decision to exercise pendent jurisdiction over the Supremacy Clause claim was not based on the discretionary considerations outlined in *Gibbs, supra.*

II

The District Court simply found the equal protection claim in this case to be "substantial" and proceeded without further discussion to the statutory claim. The Court of Appeals, reversing the determination of the District Court, found the claim to be insubstantial and therefore had no need to go further. This Court merely disagrees on the question of substantiality, reinstating the District Court's jurisdiction. Unfortunately, this process of analysis seems to me to be wrong both in its treatment of the jurisdictional question and in its failure to treat the discretionary aspects of pendent jurisdiction.

Whatever legal terminology is applied to the equal protection claim of the plaintiffs in this case, the one clear fact is that the claim is not very good. In brief, petitioners, who are recipients of public assistance under the Aid to Families with Dependent Children program, all received funds from New York, over and above their usual monthly grants, to prevent eviction from their places of lodging for nonpayment of rent. The State, pursuant to a provision of the New York Code of Rules and Regulations challenged in the District Court, sought to recover these unusual expenditures by making deductions over the next succeeding months from petitioners'

normal monthly grants. In their complaint petitioners contended that the New York recoupment procedure deprived them of equal protection of the laws.[8]

One searches in vain, either in petitioners' brief or in the opinions of the District Court or this Court, for any reason why this claim meets even a minimal test of substantiality. It would seem extraordinary if, having paid petitioners more than their normal monthly entitlement in order to meet an emergency situation, the State had not sought to recoup the payments over a period of time. The District Court, finding the claim substantial, cited *Bradford* v. *Juras*, 331 F. Supp. 167 (Ore. 1971), a decision by a three-judge district court which found jurisdiction on a similar constitutional claim and then decided the case on statutory grounds. In *Bradford*, however, the Court simply stated that it had jurisdiction under 28 U. S. C. § 1343 (3) without further discussion.[9]

The opinion of this Court sheds no more light than did the opinion of the District Court. The Court simply states:

> "This reasoning with respect to the rationality of the regulation and its propriety under the Equal Protection Clause may ultimately prove correct, but it is not immediately obvious from the decided cases

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[8] The portion of the petitioners' complaint setting forth their equal protection claim states in full:

"Said regulation irrationally and invidiously discriminates against plaintiff victims of eviction. No basis exists in law or fact, consistent with the purposes of the Social Security Act, for reducing the level of payments to plaintiffs who are then forced to live far below the subsistence levels provided to all other persons. Said regulation applies a wholly different standard in determining the grant levels of plaintiffs than the income resource and exemptions from levy standard, applicable to all other persons in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

[9] 331 F. Supp., at 168.

or so 'very plain' under the Equal Protection Clause." *Ante,* at 542.

But cases such as *Dandridge* v. *Williams,* 397 U. S. 471 (1970), have largely discredited attacks on legislative decisions about the apportionment of limited state welfare funds. At least where the Court has not found a penalty based on race or considerations such as interstate travel, the legislative judgment is upheld whenever a "conceivable rational basis" exists. Although *Dandridge* did not "suspend the operation of the Equal Protection Clause" in this area, it assuredly makes this particular claim a marginal one.[10]

I therefore cannot agree that the equal protection claim pleaded here was sufficient to confer jurisdiction on the District Court. Even assuming that the lower court may refer only to the pleadings in making its determination on the question of jurisdiction, the analysis need not be made, as the majority seems to imply, in a legal vacuum. To say that previous decisions have not foreclosed a question unless a prior case "specifically deal[s]" with the same regulation neglects the second branch of the test enunciated in *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103 (1933), and repeated in later cases, that a

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[10] The Court in *Dandridge* stated:

"Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg* v. *Kelly,* [397 U. S. 254 (1970)]. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. *Steward Mach. Co.* v. *Davis,* 301 U. S. 548, 584–585; *Helvering* v. *Davis,* 301 U. S. 619, 644." 397 U. S., at 487.

claim is insubstantial because "obviously without merit." *Id.*, at 105. Under today's rationale it appears sufficient for jurisdiction that a plaintiff is able to plead his claim with a straight face. But a district court should be able to dismiss for want of jurisdiction any claim that plainly carries no hope of success on the merits. This lack of promise in turn could be evident from recent decisions of this Court rejecting claims with a similar thesis or laying down rules which would clearly require dismissal on the merits.

Assuming, however, that the District Court here did have jurisdiction, it seems clear to me that under *Gibbs* the equal protection claim should not support the Supremacy Clause claim also asserted by petitioners. The test for exercising discretion must be a practical one, involving the type of judgments that a reasonable lawyer, evaluating the respective strengths and weaknesses of his case, might undertake. In this case it is highly improbable that a lawyer familiar with this Court's cases would place much faith in the success of his equal protection claim. In fact, examination of the complaint itself shows that substantially more attention was paid to the Supremacy Clause claim than to the claims under the Fourteenth Amendment. At the very least, the District Court, before it chose to exercise pendent jurisdiction, should have made an identifiable determination that the Equal Protection Clause was not simply asserted for the purpose of giving the Court jurisdiction over the heart of the plaintiffs' case. To my mind this seems to be a classic case of the statutory tail wagging the constitutional dog.

III

Thus, even if the Court of Appeals may have erroneously resolved the question of jurisdiction, the result it reached was correct in terms of the wise exercise of jurisdiction. Whether the equal protection claim pleaded in

this case meets the threshold of substantiality for jurisdiction in the federal courts, the claim surely should not convince a district court that its main purpose was anything other than to secure jurisdiction for the more promising Supremacy Clause claim. Presented with this situation, the District Court should have declined to exercise pendent jurisdiction over the Supremacy Clause claim and referred the equal protection claim to a three-judge court.[11] Since its failure to do so seems to me an abuse of discretion under *Gibbs*, I dissent.

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[11] Petitioners originally sought to convene a three-judge court to consider their constitutional claims but later withdrew that request. Pursuant to a stipulation between the parties, the case was then tried before a single judge on the issue of the claimed statutory conflict only. *Goosby* v. *Osser*, 409 U. S. 512 (1973), specifies that a three-judge court must be convened to hear constitutional questions within its jurisdiction if they are "substantial." It is true, of course, that federal courts commonly avoid deciding constitutional questions when alternative grounds for decision are available. See, *e. g.*, *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). But application of that principle to cases in which the constitutional claim is pleaded primarily to confer jurisdiction over a pendent claim would lead to circular reasoning. Under that theory a claim for which Congress provided no jurisdiction and which a single judge determined to be improperly brought into federal court would become a *preferred* ground for decision simply because the court wished to avoid the claim over which Congress granted jurisdiction in the first place. To turn to the pendent claim when pendent jurisdiction is properly assumed under *Gibbs* may be appropriate, but the presence of a constitutional claim which might therefore be avoided should not itself be an *independent* basis for hearing the pendent claim.

In rare cases, of course, a three-judge court may disagree with the single judge's view that a constitutional claim lacks merit and resolve the constitutional issue in the plaintiff's favor. At that point, the plaintiff will have his relief, and the case need go no further. Concededly, a constitutional decision will have been rendered when a statutory decision might have been possible, but that cost, in the few cases where it is likely to arise, seems less expensive than the cost of allowing federal jurisdiction to be unnecessarily expanded.

SMITH, SHERIFF *v.* GOGUEN

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72–1254. Argued November 12–13, 1973—
Decided March 25, 1974

Appellee, for wearing a small United States flag sewn to the seat of his trousers, was convicted of violating the provision of the Massachusetts flag-misuse statute that subjects to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States . . . ." The Massachusetts Supreme Judicial Court affirmed. The District Court in appellee's habeas corpus action found the "treats contemptuously" phrase of the statute unconstitutionally vague and overbroad. The Court of Appeals affirmed. *Held:*

1. The challenged statutory language, which had received no narrowing state court interpretation, is void for vagueness under the Due Process Clause of the Fourteenth Amendment, since by failing to draw reasonably clear lines between the kinds of nonceremonial treatment of the flag that are criminal and those that are not it does not provide adequate warning of forbidden conduct and sets forth a standard so indefinite that police, court, and jury are free to react to nothing more than their own preferences for treatment of the flag. Pp. 572–576, 578.

2. By challenging in state courts the vagueness of the "treats contemptuously" phrase as applied to him, appellee preserved his due process claim for purposes of federal habeas corpus jurisdiction, *Picard* v. *Connor*, 404 U. S. 270, since the challenged language is void for vagueness as applied to appellee or to anyone else. A "hard-core" violator concept has little meaning with regard to the challenged language, because the phrase at issue is vague not in the sense of requiring a person to conform his conduct to an imprecise but comprehensible standard, but in the sense of not specifying any ascertainable standard of conduct at all. Pp. 576–578.

3. Even if, as appellant contends, the statute could be said to deal only with "actual" flags of the United States, this would not resolve the central vagueness deficiency of failing to define contemptuous treatment. Pp. 578–579.

4. That other words of the desecration and contempt portion of the statute address more specific conduct (mutilation, trampling, and defacing of the flag) does not assist appellant, since appellee was tried solely under the "treats contemptuously" phrase, and the highest state court in this case did not construe the challenged phrase as taking color from more specific accompanying language. Pp. 579–580.

5. Regardless of whether restriction by that court of the scope of the challenged phrase to intentional contempt may be held against appellee, such an interpretation nevertheless does not clarify what conduct constitutes contempt of the flag, whether intentional or inadvertent. P. 580.

471 F. 2d 88, affirmed.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 583. BLACKMUN, J., *post*, p. 590, and REHNQUIST, J., *post*, p. 591, filed dissenting opinions, in which BURGER, C. J., joined.

Charles E. Chase, Assistant Attorney General of Massachusetts, argued the cause for appellant. With him on the briefs were *Robert H. Quinn,* Attorney General, *John J. Irwin, Jr.,* and *David A. Mills,* Assistant Attorneys General, and *William T. Buckley.*

Evan T. Lawson argued the cause for appellee. With him on the brief were *Matthew Feinberg* and *Burt Neuborne.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The sheriff of Worcester County, Massachusetts, appeals from a judgment of the United States Court of Appeals for the First Circuit holding the contempt provision of the Massachusetts flag-misuse statute unconstitutionally vague and overbroad. 471 F. 2d 88 (1972), aff'g 343 F. Supp. 161 (Mass). We noted probable jurisdiction. 412 U. S. 905 (1973). We affirm on the vague-

ness ground. We do not reach the correctness of the holding below on overbreadth or other First Amendment grounds.

I

The slender record in this case reveals little more than that Goguen wore a small cloth version of the United States flag sewn to the seat of his trousers.[1] The flag was approximately four by six inches and was displayed at the left rear of Goguen's blue jeans. On January 30, 1970, two police officers in Leominster, Massachusetts, saw Goguen bedecked in that fashion. The first officer encountered Goguen standing and talking with a group of persons on a public street. The group apparently was not engaged in any demonstration or other protest associated with Goguen's apparel.[2] No disruption of traffic or breach of the peace occurred. When this officer approached Goguen to question him about the flag, the other persons present laughed. Some time later, the second officer observed Goguen in the same attire walking in the downtown business district of Leominster.

The following day the first officer swore out a complaint against Goguen under the contempt provision of the Massachusetts flag-misuse statute. The relevant part of the statute then read:

> "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the

[1] The record consists solely of the amended bill of exceptions Goguen filed in the Massachusetts Supreme Judicial Court, the opposing briefs before that court, the complaint under which Goguen was prosecuted, and Goguen's federal habeas corpus petition. App. 1–36, 42–43. We do not have a trial transcript, although Goguen's amended bill of exceptions briefly summarizes some of the testimony given by witnesses for the prosecution at his state trial. Goguen did not take the stand. Thus we do not have of record his account of what transpired at the time of his arrest or of his purpose in wearing a flag on the seat of his trousers.

[2] Tr. of Oral Arg. 5–6, 35–36.

> United States . . . , whether such flag is public or private property . . . , shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. . . ." [3]

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[3] Mass. Gen. Laws Ann., c. 264, § 5. Omitting several sentences protecting the ceremonial activities of certain veterans' groups, the statute read as follows at the time of Goguen's arrest and conviction:

"§ 5. Flag; penalty for misuse

"Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a representation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this section be deemed to be upon such flag."

The statute is an amalgam of provisions dealing with flag desecration and contempt (the first 26 words) and with commercial misuse or other exploitation of flags of the State and National Governments. This case concerns only the "treats contemptuously" phrase of the statute, which has apparently been in the statute since its enactment in 1899. 471 F. 2d 88, 90 n. 2 (1972).

In 1971, subsequent to Goguen's prosecution, the desecration and contempt portion of the statute was amended twice. On March 8,

Despite the first six words of the statute, Goguen was not charged with any act of physical desecration.[4] As permitted by the disjunctive structure of the portion of the statute dealing with desecration and contempt, the officer charged specifically and only that Goguen "did publicly treat contemptuously the flag of the United States . . . ." [5]

After jury trial in the Worcester County Superior Court, Goguen was found guilty. The court imposed a sentence of six months in the Massachusetts House of Corrections. Goguen appealed to the Massachusetts Supreme Judicial Court, which affirmed. *Commonwealth* v. *Goguen*, — Mass. —, 279 N. E. 2d 666 (1972). That court rejected Goguen's vagueness argument with the comment that "[w]hatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here." *Id.*, at —, 279 N. E. 2d, at 667. The court cited no Massachusetts precedents

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1971, the legislature, per Stats. 1971, c. 74, modified the first sentence by inserting "burns or otherwise" between the terms "publicly" and "mutilates," and, in addition, by increasing the fine. Mass. Gen. Laws Ann., c. 264, § 5 (Supp. 1973). On August 12, 1971, per Stats. 1971, c. 655, the legislature appended a new sentence defining "the flag of the United States" phrase appearing in the first sentence: "For the purposes of this section the term 'flag of the United States' shall mean any flag which has been designated by Act or Resolution of the Congress of the United States as the national emblem, whether or not such designation is currently in force." *Ibid.* The 1971 amendments are relevant to this case only in the tangential sense that they indicate a recognition by the legislature of the need to tighten up this imprecise statute.

[4] Perhaps this was because of the difficulty of the question whether Goguen's conduct constituted physical desecration of the flag. Cf. 471 F. 2d, at 91 n. 4 ("[W]e are not so sure that sewing a flag to a background clearly affects 'physical integrity' ").

[5] App. 4.

interpreting the "treats contemptuously" phrase of the statute.[6]

After Goguen began serving his sentence, he was granted bail and then ordered released on a writ of habeas corpus by the United States District Court for the District of Massachusetts. 343 F. Supp. 161. The District Court found the flag-contempt portion of the Massachusetts statute impermissibly vague under the Due Process Clause of the Fourteenth Amendment as well as overbroad under the First Amendment. In upholding Goguen's void-for-vagueness contentions, the court concluded that the words "treats contemptuously" did not provide a "readily ascertainable standard of guilt." *Id.*, at 167. Especially in "these days when flags are commonly displayed on hats, garments and vehicles . . . ," the words under which Goguen was convicted "leave conjectural, in many instances, what conduct may subject the actor to criminal prosecution." *Ibid.* The court also found that the statutory language at issue "may be said to encourage arbitrary and erratic arrests and convictions." *Ibid.*

The Court of Appeals, with one judge concurring, affirmed the District Court on both First Amendment and vagueness grounds. 471 F. 2d 88. With regard to the latter ground, the Court of Appeals concluded that "resolution of [Goguen's void-for-vagueness] challenge to the statute as applied to him necessarily adjudicates the statute's facial constitutionality . . . ." *Id.*, at 94. Treat-

[6] Appellant correctly conceded at oral argument that Goguen's case is the first recorded Massachusetts court reading of this language. Tr. of Oral Arg. 17–18. Indeed, with the exception of one case at the turn of the century involving one of the statute's commercial-misuse provisions, *Commonwealth* v. *R. I. Sherman Mfg. Co.*, 189 Mass. 76, 75 N. E. 71 (1905), the entire statute has been essentially devoid of state court interpretation.

ing as-applied and on-the-face vagueness attacks as essentially indistinguishable in light of the imprecision of the statutory phrase at issue, *id.*, at 92, 94, the court found that the language failed to provide adequate warning to anyone, contained insufficient guidelines for law enforcement officials, and set juries and courts at large. *Id.*, at 94–96. Senior Circuit Judge Hamley, sitting by designation from the Ninth Circuit, concurred solely in the void-for-vagueness holding. *Id.*, at 105. Judge Hamley saw no need to reach the "far broader constitutional ground" of First Amendment overbreadth relied on by the majority, noting the "settled principle of appellate adjudication that constitutional questions are not to be dealt with unless this is necessary to dispose of the appeal." *Ibid.*

II

We agree with the holdings of the District Court and the Court of Appeals on the due process doctrine of vagueness. The settled principles of that doctrine require no extensive restatement here.[7] The doctrine incorporates notions of fair notice or warning.[8] Moreover, it requires

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[7] The elements of the void-for-vagueness doctrine have been developed in a large body of precedent from this Court. The cases are categorized in, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972). See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

[8] *E. g.*, *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 162 (1972); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids") (citations omitted); *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law") (citations omitted).

legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." [9] Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.[10] The statutory language at issue here, "publicly . . . treats contemptuously the flag of the United States . . . ," has such scope, *e. g., Street* v. *New York,* 394 U. S. 576 (1969) (verbal flag contempt), and at the relevant time was without the benefit of judicial clarification.[11]

Flag contempt statutes have been characterized as void for lack of notice on the theory that "[w]hat is contemptuous to one man may be a work of art to another." [12] Goguen's behavior can hardly be described as art. Immaturity or "silly conduct" [13] probably comes closer to the mark. But we see the force of the District Court's observation that the flag has become

[9] *E. g., Grayned, supra,* at 108; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89 (1921) ("[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury"); *United States* v. *Reese,* 92 U. S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large").

[10] *E. g., Grayned, supra,* at 109; *Smith* v. *California,* 361 U. S. 147, 151 (1959). Compare the less stringent requirements of the modern vagueness cases dealing with purely economic regulation. *E. g., United States* v. *National Dairy Products Corp.,* 372 U. S. 29 (1963) (Robinson-Patman Act).

[11] See n. 6, *supra.*

[12] Note, 66 Mich. L. Rev. 1040, 1056 (1968).

[13] 343 F. Supp. 161, 166.

"an object of youth fashion and high camp . . . ." 343 F. Supp., at 164. As both courts below noted, casual treatment of the flag in many contexts has become a widespread contemporary phenomenon. *Id.*, at 164, 167; 471 F. 2d, at 96. Flag wearing in a day of relaxed clothing styles may be simply for adornment or a ploy to attract attention. It and many other current, careless uses of the flag nevertheless constitute unceremonial treatment that many people may view as contemptuous. Yet in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag. The statutory language under which Goguen was charged, however, fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not. Due process requires that all "be informed as to what the State commands or forbids," *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939), and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). Given today's tendencies to treat the flag unceremoniously, those notice standards are not satisfied here.

We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language.[14] In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies.

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[14] Note, 109 U. Pa. L. Rev., *supra*, n. 7, at 82 n. 79.

In its terms, the language at issue is sufficiently unbounded to prohibit, as the District Court noted, "any public deviation from formal flag etiquette . . . ." 343 F. Supp., at 167. Unchanged throughout its 70-year history,[15] the "treats contemptuously" phrase was also devoid of a narrowing state court interpretation at the relevant time in this case.[16] We are without authority to cure that defect.[17] Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law. *E. g., Papachristou* v. *City of Jacksonville,* 405 U. S. 156, 165–169 (1972). In *Gregory* v. *City of Chicago,* 394 U. S. 111, 120 (1969), Mr. Justice Black, in a concurring opinion, voiced a concern, which we share, against entrusting lawmaking "to the moment-to-moment judgment of the policeman on his beat." The aptness of his admonition is evident from appellant's candid concession during oral argument before the Court of Appeals regarding state enforcement standards for that portion of the statute under which Goguen was convicted:

"[A]s counsel [for appellant] admitted, a war pro-

[15] See n. 3, *supra.*

[16] See n. 6, *supra.* The contempt portion of the Massachusetts statute seems to have lain fallow for almost its entire history. Apparently there have been about a half dozen arrests under this part of the statute in recent years, but none has produced a reported decision. Tr. of Oral Arg. 28–29. In 1968, a teenager in Lynn, Massachusetts, was charged, apparently under the present statute, with desecrating the United States flag by sewing pieces of it into his trousers. New York Times, Sept. 1, 1968, p. 31, col. 1. The teenager was ordered by a state district court to prepare and deliver an essay on the flag. The court continued the case without a finding, depriving it of any precedential value.

[17] *E. g., United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 369 (1971).

> testor who, while attending a rally at which it begins to rain, evidences his disrespect for the American flag by contemptuously covering himself with it in order to avoid getting wet, would be prosecuted under the Massachusetts statute. Yet a member of the American Legion who, caught in the same rainstorm while returning from an 'America—Love It or Leave It' rally, similarly uses the flag, but does so regrettably and without a contemptuous attitude, would *not* be prosecuted." 471 F. 2d, at 102 (emphasis in original).

Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.

III

Appellant's arguments that the "treats contemptuously" phrase is not impermissibly vague, or at least should not be so held in this case, are unpersuasive. Appellant devotes a substantial portion of his opening brief, as he did his oral argument, to the contention that Goguen failed to preserve his present void-for-vagueness claim for the purposes of federal habeas corpus jurisdiction. Appellant concedes that the issue of "vagueness as applied" is properly before the federal courts,[18] but contends that Goguen's only arguable claim is that the statute is vague on its face. The latter claim, appellant insists, was not presented to the state courts with the requisite fair precision. *Picard* v. *Connor*, 404 U. S. 270 (1971). This exhaustion-of-remedies argument is belatedly raised,[19] and it fails to take the full measure of

[18] Reply Brief for Appellant 4.

[19] Goguen filed his federal habeas corpus petition subsequent to *Picard* v. *Connor*, 404 U. S. 270 (1971). Yet it appears that appellant did not raise his present exhaustion-of-remedies argument before the District Court. That court commented specifically on this

Goguen's efforts to mount a vagueness attack in the state courts.[20] We do not deal with the point at length, however, for we find the relevant statutory language impermissibly vague as applied to Goguen. Without doubt the "substance" of this claim was "fairly presented" to the state courts under the exhaustion standards of *Picard, supra,* at 275, 278.

Appellant's exhaustion-of-remedies argument is premised on the notion that Goguen's behavior rendered him a hard-core violator as to whom the statute was not vague, whatever its implications for those engaged in different conduct. To be sure, there are statutes that

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omission: "No contention is now made that [Goguen] has not exhausted state remedies, nor that the constitutional issues presented here were not raised appropriately in state proceedings." 343 F. Supp., at 164.

[20] Goguen filed in State Superior Court an unsuccessful motion to dismiss the complaint in which he cited the Fourteenth Amendment and alleged that the statute under which he was charged was "impermissibly vague and incapable of fair and reasonable interpretation by public officials." App. 1. This motion was also before the Massachusetts Supreme Judicial Court, since it was incorporated in Goguen's amended bill of exceptions. *Ibid.* In addition, Goguen's brief before that court raised vagueness points and cited vagueness cases. *Id.,* at 19, 26–27, citing *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939), and *Parker* v. *Morgan,* 322 F. Supp. 585 (WDNC 1971) (three-judge court) (North Carolina flag contempt statute void for vagueness and overbreadth). Appellant is correct in asserting that Goguen failed to compartmentalize in his state court brief the due process doctrine of vagueness and First Amendment concepts of overbreadth. See App. 19–24. But permitting a degree of leakage between those particular adjoining compartments is understandable. Cf. Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 871–875 (1970). The highest state court's opinion, which dealt separately with Goguen's First Amendment and vagueness claims, *Commonwealth* v. *Goguen,* — Mass. —, —, 279 N. E. 2d 666, 667 (1972), indicates that that court was well aware that Goguen raised both sets of arguments.

by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain. The hard-core violator concept makes some sense with regard to such statutes. The present statute, however, is not in that category. This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971). Such a provision simply has *no* core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language. In our opinion the defect exists in this case. The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag.

Turning from the exhaustion point to the merits of the vagueness question presented, appellant argues that any notice difficulties are ameliorated by the narrow subject matter of the statute, *viz.*, "actual" flags of the United States.[21] Appellant contends that this "takes some of the vagueness away from the phrase, 'treats contemptuously . . . .' "[22] Anyone who "wants notice as to what conduct this statute proscribes . . . , immediately knows that it has something to do with flags and if he

[21] Brief for Appellant 17; Tr. of Oral Arg. 9.

[22] *Ibid.*

wants to stay clear of violating this statute, he just has to stay clear of doing something to the United States flag." [23] Apart from the ambiguities presented by the concept of an "actual" flag,[24] we fail to see how this alleged particularity resolves the central vagueness question—the absence of any standard for defining contemptuous treatment.

Appellant's remaining arguments are equally unavailing. It is asserted that the first six words of the statute add specificity to the "treats contemptuously" phrase, and that the Massachusetts Supreme Judicial Court customarily construes general language to take on color from more specific accompanying language. But it is conceded that Goguen was convicted under the general phrase alone, and that the highest state court did not rely on any general-to-specific principle of statutory

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[23] *Ibid.*

[24] At the time of Goguen's prosecution, the statute referred simply to "the flag of the United States . . . ," without further definition. That raises the obvious question whether Goguen's miniature cloth flag constituted "the flag of the United States . . . ." Goguen argued unsuccessfully before the state courts that the statute applied only to flags that met "official standards" for proportions, such as relation of height to width and the size of stripes and the field of stars, and that the cloth he wore did not meet those standards. Tr. of Oral Arg. 11–12, 24–26; App. 2. There was no dispute that Goguen's adornment had the requisite number of stars and stripes and colors. Tr. of Oral Arg. 11–12. The Massachusetts Supreme Judicial Court found Goguen's cloth flag to be covered by the statute, noting that "[t]he statute does not require that the flag be 'official,'" *Commonwealth* v. *Goguen*, — Mass., at —, 279 N. E. 2d, at 668. The lower federal courts did not address this holding, nor do we. We note only that the Massachusetts Legislature apparently sensed an ambiguity in this respect, because subsequent to Goguen's prosecution it amended the statute in an effort to define what it had meant by the "flag of the United States." See n. 3, *supra*.

interpretation in this case.[25] Appellant further argues that the Supreme Judicial Court in Goguen's case has restricted the scope of the statute to intentional contempt.[26] Aside from the problems presented by an appellate court's limiting construction in the very case in which a defendant has been tried under a previously unnarrowed statute,[27] this holding still does not clarify what conduct constitutes contempt, whether intentional or inadvertent.

Finally, appellant argues that state law enforcement authorities have shown themselves ready to interpret this penal statute narrowly and that the statute, properly read, reaches only direct, immediate contemptuous acts that "actually impinge upon the physical integrity of the flag . . . ." [28] There is no support in the record for the former point.[29] Similarly, nothing in the state

[25] Tr. of Oral Arg. 48.

[26] The Massachusetts court commented simply that "[t]he jury could infer that the violation was intentional without reviewing any words of the defendant." *Commonwealth* v. *Goguen, supra,* at —, 279 N. E. 2d, at 668. Thus, the court held that the jury could infer intent merely from Goguen's conduct. This is apparently also a holding that the jury *must* find contemptuous intent under the statute, although the requirement amounts to very little since it is so easily satisfied. The court's reference to verbal communication reflected Goguen's reliance on *Street* v. *New York,* 394 U. S. 576 (1969).

[27] *E. g., Ashton* v. *Kentucky,* 384 U. S. 195, 198 (1966).

[28] Brief for Appellant 22.

[29] With regard to prosecutorial policies, appellant cites two published opinions of the Massachusetts Attorney General. 4 Op. Atty. Gen. 470–473 (1915) (reproduced in Brief for Appellant 30); Report of Atty. Gen., Pub. Doc. No. 12, p. 192 (1968) (reproduced in Jurisdictional Statement App. 53). Appellant concedes that neither deals with the contempt portion of the statute under which Goguen was convicted. Thus, they are not in point here. They provided guidance to no one on the relevant statutory language. Nevertheless, appellant is correct that they show a tendency on the

court's opinion in this case or in any earlier opinion of that court sustains the latter. In any event, Goguen was charged only under the wholly open-ended language of publicly treating the flag "contemptuously." There was no allegation of physical desecration.

There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order. Cf. *Colten* v. *Kentucky*, 407 U. S. 104 (1972). But there is no comparable reason for committing broad discretion to law enforcement officials in the area of flag contempt. Indeed, because display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw. Certainly nothing prevents a legislature from defining with substantial specificity what

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part of the State Attorney General to read other portions of the statute narrowly. At the same time, they reflect the lack of precision recurring throughout the Massachusetts flag-misuse statute. The 1915 opinion noted that a literal reading of one portion of the statute, prohibiting exhibition of engravings of the flag on certain articles, would make it a criminal offense to display the flag itself "in many of its cheaper and more common forms." Brief for Appellant 31–32. The State Attorney General concluded that this would be a "manifest absurdity." *Id.*, at 32. The 1968 opinion advised that a flag representation painted on a door was not "a flag of the United States" within the meaning of the statute. Jurisdictional Statement App. 53–55. A contrary interpretation would "raise serious questions under the First and Fourteenth Amendments . . . ," given the requirement that behavior made criminal must be "plainly prohibited by the language of the statute." *Id.*, at 54.

constitutes forbidden treatment of United States flags.[30] The statutory language at issue here fails to approach that goal and is void for vagueness.[31] The judgment is affirmed.[32]

It is so ordered.

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[30] The federal flag desecration statute, for example, reflects a congressional purpose to do just that. In response to a warning by the United States Attorney General that to use such unbounded terms as "defies" or "casts contempt . . . either by word or act" is "to risk invalidation" on vagueness grounds, S. Rep. No. 1287, 90th Cong., 1st Sess., 5 (1968); H. R. Rep. No. 350, 90th Cong., 1st Sess., 7 (1967), the bill which became the federal statute was amended, 113 Cong. Rec. 16449, 16450 (1967), to reach only acts that physically damage the flag. The desecration provision of the statute, 18 U. S. C. § 700 (a), declares:

"(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

The legislative history reveals a clear desire to reach only defined physical acts of desecration. "The language of the bill prohibits intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag." H. R. Rep. No. 350, *supra*, at 3; S. Rep. No. 1287, *supra*, at 3. The act has been so read by the lower federal courts, which have upheld it against vagueness challenges. *United States* v. *Crosson*, 462 F. 2d 96 (CA9) cert. denied, 409 U. S. 1064 (1972); *Joyce* v. *United States*, 147 U. S. App. D. C. 128, 454 F. 2d 971 (1971), cert. denied, 405 U. S. 969 (1972). See *Hoffman* v. *United States*, 144 U. S. App. D. C. 156, 445 F. 2d 226 (1971).

[31] We are aware, of course, of the universal adoption of flag desecration or contempt statutes by the Federal and State Governments. See n. 30, *supra*. The statutes of the 50 States are synopsized in Hearings on H. R. 271 et al., before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess., ser. 4, pp. 324–346 (1967). Most of the state statutes are patterned after the Uniform Flag Law of 1917, which in § 3 provides:

"No person shall publicly mutilate, deface, defile, defy, trample

[*Footnote 32 is on p. 583*]

MR. JUSTICE WHITE, concurring in the judgment.

It is a crime in Massachusetts if one mutilates, tramples, defaces or "treats contemptuously" the flag of the United States. Appellee Goguen was convicted of treating the flag contemptuously, the evidence being that he wore a likeness of the flag on the seat of his pants. The Court holds this portion of the statute too vague to provide an ascertainable standard of guilt in any situation, including this one. Although I concur in the judgment of affirmance for other reasons, I cannot agree with this rationale.[1]

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upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."

Compare 9B Uniform Laws Ann. 52–53 (1966), with Hearings on H. R. 271 et al., *supra*, at 321–346. Because it is stated in the disjunctive, this language, like that before us, makes possible criminal prosecution solely for casting contempt upon the flag. But the validity of statutes utilizing this language, insofar as the vagueness doctrine is concerned, will depend as much on their judicial construction and enforcement history as their literal terms.

[32] We have not addressed Goguen's First Amendment arguments because, having found the challenged statutory language void for vagueness, there is no need to decide additional issues. Moreover, the skeletal record in this case, see n. 1, *supra*, affords a poor opportunity for the careful consideration merited by the importance of the First Amendment issues Goguen has raised.

[1] There has been recurring litigation, with diverse results, over the validity of flag use and flag desecration statutes. Representative of the federal and state cases are the following: *Thoms* v. *Heffernan*, 473 F. 2d 478 (CA2 1973); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F. 2d 344 (CA2 1970); *United States* v. *Crosson*, 462 F. 2d 96 (CA9), cert. denied, 409 U. S. 1064 (1972); *Joyce* v. *United States*, 147 U. S. App. D. C. 128, 454 F. 2d 971 (1971), cert. denied, 405 U. S. 969 (1972); *Deeds* v. *Beto*, 353 F. Supp. 840 (ND Tex. 1973); *Oldroyd* v. *Kugler*, 327 F. Supp. 176 (NJ 1970), rev'd, 461 F. 2d 535 (CA3 1972), abstention on remand, 352 F. Supp. 27, aff'd, 412 U. S. 924 (1973); *Sutherland* v. *DeWulf*, 323 F. Supp. 740 (SD Ill. 1971); *Parker* v. *Morgan*, 322

I

It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is contemptuous conduct and that would be covered by the statute if directed at the flag. In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed contemptuous by the State, but unpredictability in those situations does not change the certainty in others.

I am also confident that the statute was not vague with respect to the conduct for which Goguen was arrested and convicted. It should not be beyond the reasonable comprehension of anyone who would conform his conduct to the law to realize that sewing a flag on the seat of his pants is contemptuous of the flag. The

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F. Supp. 585 (WDNC 1971); *Crosson* v. *Silver*, 319 F. Supp. 1084 (Ariz. 1970); *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (Del. 1970), rev'd on other grounds *sub nom. Hodsdon* v. *Stabler*, 444 F. 2d 533 (CA3 1971); *United States* v. *Ferguson*, 302 F. Supp. 1111 (ND Cal. 1969); *State* v. *Royal*, 113 N. H. 224, 305 A. 2d 676 (1973); *State* v. *Zimmelman*, 62 N. J. 279, 301 A. 2d 129 (1973); *State* v. *Spence*, 81 Wash. 2d 788, 506 P. 2d 293, probable jurisdiction noted, 414 U. S. 815 (1973) (*sub judice*); *City of Miami* v. *Wolfenberger*, 265 So. 2d 732 (Fla. Dist. Ct. App. 1972); *State* v. *Mitchell*, 32 Ohio App. 2d 16, 288 N. E. 2d 216 (1972); *State* v. *Liska*, 32 Ohio App. 2d 317, 291 N. E. 2d 498 (1971); *State* v. *Van Camp*, 6 Conn. Cir. 609, 281 A. 2d 584 (1971); *State* v. *Waterman*, 190 N. W. 2d 809 (Iowa 1971); *State* v. *Saulino*, 29 Ohio Misc. 25, 277 N. E. 2d 580 (1971); *Deeds* v. *State*, 474 S. W. 2d 718 (Crim. App. Tex. 1971); *People* v. *Radich*, 26 N. Y. 2d 114, 257 N. E. 2d 30 (1970), aff'd by an equally divided court, 401 U. S. 531, rehearing denied, 402 U. S. 989 (1971); *People* v. *Cowgill*, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (1969), appeal dismissed, 396 U. S. 371 (1970); *Hinton* v. *State*, 223 Ga. 174, 154 S. E. 2d 246 (1967), rev'd on other grounds *sub nom. Anderson* v. *Georgia*, 390 U. S. 206 (1968).

Supreme Judicial Court of Massachusetts, in affirming the conviction, stated that the "jury could infer that the violation was intentional . . . ." If he thus intended the very act which the statute forbids, Goguen can hardly complain that he did not realize his acts were in violation of the statute. "[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . [W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Screws* v. *United States*, 325 U. S. 91, 101–102 (1945).

If it be argued that the statute in this case merely requires an intentional act, not a willful one in the sense of intending what the statute forbids, then it must be recalled that appellee's major argument is that wearing a flag patch on his trousers was conduct that "clearly expressed an idea, albeit unpopular or unpatriotic, about the flag or about the country it symbolizes . . . . Goguen may have meant to show that he believed that America was a fit place only to sit on, or the proximity to that portion of his anatomy might have had more vulgar connotations. Nonetheless, the strong and forceful communication of ideas is unmistakable." App. 13. Goguen was under no misapprehension as to what he was doing and as to whether he was showing contempt for the flag of the United States. As he acknowledges in his brief here, "it was necessary for the jury to find that appellee conveyed a contemptuous attitude in order to convict him." I cannot, therefore, agree that the Massachusetts statute is vague as to Goguen; and if not vague as to his conduct, it is irrelevant that it may be vague in other contexts with respect to other

conduct. "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 33 (1963). Statutes are not "invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Id.*, at 32.

The unavoidable inquiry, therefore, becomes whether the "treats contemptuously" provision of the statute, as applied in this case, is unconstitutional under the First Amendment. That Amendment, of course, applies to speech and not to conduct without substantial communicative intent and impact. Even though particular conduct may be expressive and is understood to be of this nature, it may be prohibited if necessary to further a nonspeech interest of the Government that is within the power of the Government to implement. *United States* v. *O'Brien*, 391 U. S. 367 (1968).

There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the common defense, and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag. It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat. 341, c. 1, just as they had for the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777). It is a fact of history that flags have been associated with nations and with government at all levels,

as well as with tribes and families. It is also a historical fact that flags, including ours, have played an important and useful role in human affairs. One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition. The United States has created its own flag, as it may. The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it.

I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. Neither would I find it beyond congressional power, or that of state legislatures, to forbid attaching to or putting on the flag any words, symbols, or advertisements.[2] All of these objects, whatever their nature, are foreign to the flag, change its physical character, and interfere with its design and function. There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.

II

I would affirm Goguen's conviction, therefore, had he been convicted for mutilating, trampling upon, or defacing the flag, or for using the flag as a billboard for

[2] For a treatment of statutes protective of the flag, see Rosenblatt, Flag Desecration Statutes: History and Analysis, 1972 Wash. U. L. Q. 193.

commercial advertisements or other displays. The Massachusetts statute, however, does not stop with proscriptions against defacement or attaching foreign objects to the flag. It also makes it a crime if one "treats contemptuously" the flag of the United States, and Goguen was convicted under this part of the statute. To violate the statute in this respect, it is not enough that one "treat" the flag; he must also treat it "contemptuously," which, in ordinary understanding, is the expression of contempt for the flag. In the case before us, as has been noted, the jury must have found that Goguen not only wore the flag on the seat of his pants but also that the act—and hence Goguen himself—was contemptuous of the flag. To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.[3]

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[3] Massachusetts has not construed its statute to eliminate the communicative aspect of the proscribed conduct as a crucial element of the violation. In *State* v. *Royal*, 113 N. H. 224, 305 A. 2d 676 (1973), the New Hampshire Supreme Court, noting among other things that the State has a valid interest in the physical integrity of the flag, rejected a facial attack on its flag desecration statute, which made it a crime to publicly mutilate, trample upon, defile, deface, or cast contempt upon the flag. The court construed the statute to be "directed at acts upon the flag and not 'at the expression of and mere belief in particular ideas.'" *Id.*, at 230, 305 A. 2d, at 680. The proscription against casting contempt upon the flag was to be understood as a general prohibition of acts of the same nature as the previously forbidden acts of mutilation and defacement, not as a proscription of the expression of ideas. Thus:

"Our statute is more narrowly drawn than some flag statutes. It deals only with the flag itself or any 'flag or ensign evidently purporting to be' the flag. *State* v. *Cline*, [113 N. H. 245], 305 A. 2d 673, decided this date. Also, as we construe it, our statute prohibits only acts of mutilation and defilement inflicted directly upon the flag

Neither the United States nor any State may require any individual to salute or express favorable attitudes toward the flag. *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624 (1943). It is also clear under our cases that disrespectful or contemptuous spoken or written words about the flag may not be punished consistently with the First Amendment. *Street* v. *New York,* 394 U. S. 576 (1969). Although neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the First Amendment, *Tinker* v. *Des Moines Independent Community School District,* 393 U. S. 503 (1969), and may not be forbidden by law except when incidental to preventing unprotected conduct or unless the communication is itself among those that fall outside the protection of the First Amendment. In *O'Brien, supra,* the Court sustained a conviction for draft card burning, although admittedly the burning was itself expressive. There, destruction of draft cards, whether communicative or not, was found to be inimical to important governmental considerations. But the Court made clear that if the concern of the law was with the expression associated with the act, the result would be otherwise:

"The case at bar is therefore unlike one where the alleged governmental interest in regulating con-

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itself and does not prohibit acts which are directed at the flag without touching it. The statute enumerates specific acts of flag desecration, namely 'mutilate, trample upon, defile, deface,' all of which involve physical acts upon the flag. The general term 'cast contempt' follows these enumerated specific acts. We hold that the phrase 'or cast contempt by . . . acts' as used in RSA 573:4 is limited to physical abuse type of acts similar to those previously enumerated in the statute. 2 Sutherland, Statutory Construction § 4909 (3d rev. ed. Horack 1943); *State* v. *Small,* 99 N. H. 349, 111 A. 2d 201 (1955); *State* v. *N. H. Gas & Electric Co.,* 86 N. H. 16, 163 A. 724 (1932)." *Id.,* at 227, 305 A. 2d, at 679.

> duct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California*, 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." 391 U. S., at 382.

It would be difficult, therefore, to believe that the conviction in *O'Brien* would have been sustained had the statute proscribed only contemptuous burning of draft cards.

Any conviction under the "treats contemptuously" provision of the Massachusetts statute would suffer from the same infirmity. This is true of Goguen's conviction. And if it be said that the conviction does not violate the First and Fourteenth Amendments because Goguen communicated nothing at all by his conduct and did not intend to do so, there would then be no evidentiary basis whatsoever for convicting him of being "contemptuous" of the flag. I concur in the Court's judgment.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with MR. JUSTICE WHITE in his conclusion that the Massachusetts flag statute is not unconstitutionally vague. I disagree with his conclusion that the words "treats contemptuously" are necessarily directed at protected speech and that Goguen's conviction for his immature antic therefore cannot withstand constitutional challenge.

I agree with MR. JUSTICE REHNQUIST when he concludes that the First Amendment affords no shield to Goguen's conduct. I reach that result, however, not on the ground that the Supreme Judicial Court of Massachusetts "would read" the language of the Massachusetts statute to require that "treats contemptuously" entails physical contact with the flag and the protection of its physical integrity, but on the ground that that court, by its unanimous rescript opinion, has in fact already done exactly that. The court's opinion states that Goguen "was not prosecuted for being 'intellectually . . . diverse' or for 'speech,' as in Street v. New York, 394 U. S. 576, 593–594 . . . ." Having rejected the vagueness challenge and concluded that Goguen was not punished for speech, the Massachusetts court, in upholding the conviction, has necessarily limited the scope of the statute to protecting the physical integrity of the flag. The requisite for "treating contemptuously" was found and the court concluded that punishment was not for speech—a communicative element. I, therefore, must conclude that Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants. I accept the Massachusetts court's opinion at what I regard as its face value.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the concurring opinion of my Brother WHITE insofar as he concludes that the Massachusetts law is not unconstitutionally vague, but I do not agree with him that the law under which appellee Goguen was convicted violates the First and Fourteenth Amendments. The issue of the application of the First Amendment to expressive conduct, or "symbolic speech," is

undoubtedly a difficult one, and in cases dealing with the United States flag it has unfortunately been expounded only in dissents and concurrences. See *Street* v. *New York*, 394 U. S. 576, 594 (1969) (Warren, C. J., dissenting), 609 (Black, J., dissenting), 610 (WHITE, J., dissenting), 615 (Fortas, J., dissenting); and *Cowgill* v. *California*, 396 U. S. 371 (1970) (Harlan, J., concurring). Nonetheless, since I disagree with the Court's conclusion that the statute is unconstitutionally vague, I must, unlike the Court, address appellant's First Amendment contentions.

The question whether the State may regulate the display of the flag in the circumstances shown by this record appears to be an open one under our decisions. *Halter* v. *Nebraska*, 205 U. S. 34 (1907); *Street* v. *New York*, *supra*; *Cowgill* v. *California*, *supra* (Harlan, J., concurring); *People* v. *Radich*, 26 N. Y. 2d 114, 257 N. E. 2d 30, aff'd by an equally divided Court, 401 U. S. 531 (1971).

What the Court rightly describes as "the slender record in this case," *ante*, at 568, shows only that Goguen wore a small cloth version of the United States flag sewn to the seat of his blue jeans. When the first police officer questioned him, he was standing with a group of people on Main Street in Leominster, Massachusetts. The people with him were laughing. When the second police officer saw him, he was "walking in the downtown business district of Leominster, wearing a short coat, casual type pants and a miniature American flag sewn on the left side of his pants." Goguen did not testify, and there is nothing in the record before us to indicate what he was attempting to communicate by his conduct, or, indeed, whether he was attempting to communicate anything at all. The record before us does not even conclusively reveal whether Goguen sewed the flag on the

pants himself, or whether the pants were manufactured complete with flag; his counsel here, however, who was also his trial counsel, stated in oral argument that of his own knowledge the pants were not manufactured with the flag on them. Finally, it does not appear whether appellee said anything during his journey through the streets of Leominster; his amended bill of exceptions to the Supreme Judicial Court of Massachusetts made no mention of any testimony indicating that he spoke at all.

Goguen was prosecuted under the Massachusetts statute set forth in the opinion of the Court, and has asserted here not only a claim of unconstitutional vagueness but a claim that the statute infringes his right under the First and Fourteenth Amendments.

I

There is a good deal of doubt on this record that Goguen was trying to communicate any particular idea, and had he been convicted under a statute which simply prohibited improper display of the flag I would be satisfied to conclude that his conduct in wearing the flag on the seat of his pants did not come within even the outermost limits of that sort of "expressive conduct" or "symbolic speech" which is entitled to any First Amendment protection. But Goguen was convicted of treating the flag contemptuously by the act of wearing it where he did, and I have difficulty seeing how Goguen could be found by a jury to have treated the flag contemptuously by his act and still not to have expressed any idea at all. There are, therefore, in my opinion, at least marginal elements of "symbolic speech" in Goguen's conduct as reflected by this record.

Many cases which could be said to involve conduct no less expressive than Goguen's, however, have never been thought to require analysis in First Amendment

terms because of the presence of other factors. One who burns down the factory of a company whose products he dislikes can expect his First Amendment defense to a consequent arson prosecution to be given short shrift by the courts. The arson statute safeguards the government's substantial interest in preventing the destruction of property by means dangerous to human life, and an arsonist's motive is quite irrelevant. The same fate would doubtless await the First Amendment claim of one prosecuted for destruction of government property after he defaced a speed limit sign in order to protest the stated speed limit. Both the arsonist and the defacer of traffic signs have infringed on the property interests of others, whether of another individual or of the government. Yet Goguen, unlike either, has so far as this record shows infringed on the ordinary property rights of no one.

That Goguen owned the flag with which he adorned himself, however, is not dispositive of the First Amendment issue. Just as the government may not escape the reach of the First Amendment by asserting that it acts only in a proprietary capacity with respect to streets and parks to which it has title, *Hague* v. *CIO*, 307 U. S. 496, 514–516 (1939), a defendant such as Goguen may not escape the reach of the police power of the State of Massachusetts by asserting that his act affected only his own property. Indeed, there are so many well-established exceptions to the proposition that one may do what he likes with his own property that it cannot be said to have even the status of a general rule.

The very substantial authority of state and local governing bodies to regulate the use of land, and thereby to limit the uses available to the owner of the land, was established nearly a half century ago in *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926). Land-use regulations

in a residential zoning district typically do not merely exclude malodorous and unsightly rendering plants; they often also prohibit erection of buildings or monuments, including ones open to the public, which might itself in an aesthetic sense involve substantial elements of "expressive conduct." The performance of a play may well constitute expressive conduct or "pure" speech, but a landowner may not for that reason insist on the right to construct and operate a theater in an area zoned for noncommercial uses. So long as the zoning laws do not, under the guise of neutrality, actually prohibit the expression of ideas because of their content, they have not been thought open to challenge under the First Amendment.

As may land, so may other kinds of property be subjected to close regulation and control. A person with an ownership interest in controlled drugs, or in firearms, cannot use them, sell them, and transfer them in whatever manner he pleases. The copyright laws, 17 U. S. C. § 1 *et seq.*, limit what use the purchaser of a copyrighted book may make of his acquisition. A company may be restricted in what it advertises on its billboards, *Packer Corp.* v. *Utah*, 285 U. S. 105 (1932).

The statute which Goguen violated, however, does not purport to protect the related interests of other property owners, neighbors, or indeed any competing ownership interest in the same property; the interest which it protects is that of the Government, and is not a traditional property interest.

Even in this, however, laws regulating use of the flag are by no means unique. A number of examples can be found of statutes enacted by Congress which protect only a peculiarly governmental interest in property otherwise privately owned. Title 18 U. S. C. § 504 prohibits the printing or publishing in actual size or in actual

color of any United States postage or revenue stamp, or of any obligation or security of the United States. It likewise prohibits the importation of any plates for the purpose of such printing. Title 18 U. S. C. § 331 prohibits the alteration of any Federal Reserve note or national bank note, and 18 U. S. C. § 333 prohibits the disfiguring or defacing of any national bank note or coin. Title 18 U. S. C. § 702 prohibits the wearing of a military uniform, any part of such uniform, or anything similar to a military uniform or part thereof without proper authorization. Title 18 U. S. C. § 704 prohibits the unauthorized wearing of service medals. It is not without significance that many of these statutes, though long on the books, have never been judicially construed or even challenged.

My Brother WHITE says, however, that whatever may be said of neutral statutes simply designed to protect a governmental interest in private property, which in the case of the flag may be characterized as an interest in preserving its physical integrity, the Massachusetts statute here is not neutral. It punishes only those who treat the flag contemptuously, imposing no penalty on those who "treat" it otherwise, that is, those who impair its physical integrity in some other way.

II

Leaving aside for the moment the nature of the governmental interest in protecting the physical integrity of the flag, I cannot accept the conclusion that the Massachusetts statute must be invalidated for punishing only some conduct that impairs the flag's physical integrity. It is true, as the Court observes, that we do not have in so many words a "narrowing construction" of the statute from the Supreme Judicial Court of Massachusetts. But the first of this Court's decisions cited in the short

rescript opinion of the Supreme Judicial Court is *Halter* v. *Nebraska,* 205 U. S. 34 (1907), which upheld against constitutional attack a Nebraska statute which forbade the use of the United States flag for purposes of advertising. We also have the benefit of an opinion of the Attorney General of the Commonwealth of Massachusetts that the statute under which Goguen was prosecuted, being penal, " 'is not to be enlarged beyond its plain import, and as a general rule is strictly construed.' " Report of Atty. Gen., Pub. Doc. No. 12, pp. 192–193 (1968). With this guidance, and the further assistance of the content of the entire statutory prohibition, I think the Supreme Judicial Court would read the language "whoever publicly mutilates, tramples upon, defaces, or treats contemptuously the flag of the United States . . ." as carrying the clear implication that the contemptuous treatment, like mutilation, trampling upon, or defacing, must involve some actual physical contact with the flag itself. Such a reading would exclude a merely derogatory gesture performed at a distance from the flag, as well as purely verbal disparagement of it.*

If the statute is thus limited to acts which affect the physical integrity of the flag, the question remains whether the State has sought only to punish those who impair the flag's physical integrity for the purpose of disparaging it as a symbol, while permitting impairment

*To the extent that counsel for appellant who argued the cause in the Court of Appeals may have intimated a broader construction in the colloquy in that court quoted in this Court's opinion, *ante,* at 575–576. I would attach little weight to it. We have previously said that we are "loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument," *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 170 (1972), and if that be the case surely even less weight should be ascribed by us to a colloquy which took place in another court.

of its physical integrity by those who do not seek to disparage it as a symbol. If that were the case, holdings like *Schacht* v. *United States*, 398 U. S. 58 (1970), suggest that such a law would abridge the right of free expression.

But Massachusetts metes out punishment to anyone who publicly mutilates, tramples, or defaces the flag, regardless of his motive or purpose. It also punishes the display of any "words, figures, advertisements or designs" on the flag, or the use of a flag in a parade as a receptacle for depositing or collecting money. Likewise prohibited is the offering or selling of any article on which is engraved a representation of the United States flag.

The variety of these prohibitions demonstrates that Massachusetts has not merely prohibited impairment of the physical integrity of the flag by those who would cast contempt upon it, but equally by those who would seek to take advantage of its favorable image in order to facilitate any commercial purpose, or those who would seek to convey any message at all by means of imprinting words or designs on the flag. These prohibitions are broad enough that it can be fairly said that the Massachusetts statute is one essentially designed to preserve the physical integrity of the flag, and not merely to punish those who would infringe that integrity for the purpose of disparaging the flag as a symbol. While it is true that the statute does not appear to cover one who simply wears a flag, unless his conduct for other reasons falls within its prohibitions, the legislature is not required to address every related matter in an area with one statute. *Katzenbach* v. *Morgan*, 384 U. S. 641, 656–658 (1966). It may well be that the incidence of such conduct at the time the statute was enacted was not thought to warrant legislation in order to preserve the physical integrity of the flag.

In *United States* v. *O'Brien,* 391 U. S. 367 (1968), the Court observed:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.,* at 376.

Then, proceeding "on the assumption that the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Court held that a regulation of conduct was sufficiently justified

> "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.,* at 377.

While I have some doubt that the first enunciation of a group of tests such as those established in *O'Brien* sets them in concrete for all time, it does seem to me that the Massachusetts statute substantially complies with those tests. There can be no question that a statute such as the Massachusetts one here is "within" the constitutional power of a State to enact. Since the statute by this reading punishes a variety of uses of the flag which would impair its physical integrity, without regard to presence or character of expressive conduct in connection with those uses, I think the governmental interest is unrelated to the suppression of free expression. The question of whether the governmental interest is "substantial" is not easy to sever from the question of whether the restriction is "no greater than is essential to the furtherance of that interest," and I therefore treat those

two aspects of the matter together. I believe that both of these tests are met, and that the governmental interest is sufficient to outweigh whatever collateral suppression of expressive conduct was involved in the actions of Goguen. In so concluding, I find myself in agreement not only with my Brother WHITE in this case, but with those members of the Court referred to earlier in this opinion who dissented from the Court's disposition in the case of *Street* v. *New York*, 394 U. S. 576 (1969).

My Brother WHITE alludes to the early legislation both of the Continental Congress and of the Congress of the new Nation dealing with the flags, and observes: "One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition." I agree.

On September 17, 1787, as the last members of the Constitutional Convention were signing the instrument, James Madison in his "Notes" describes the occurrence of the following incident:

> "Whilst the last members were signing it Doctor Franklin looking towards the President's Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have said he, often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting sun." 4 Writings of James Madison 482–483 (Hunt ed. 1903).

Writing for this Court more than one hundred years later, Mr. Justice Holmes made the familiar statement:

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland,* 252 U. S. 416, 433 (1920).

From its earliest days, the art and literature of our country have assigned a special place to the flag of the United States. It figures prominently in at least one of Charles Willson Peale's portraits of George Washington, showing him as leader of the forces of the 13 Colonies during the Revolutionary War. No one who lived through the Second World War in this country can forget the impact of the photographs of the members of the United States Marine Corps raising the United States flag on the top of Mount Suribachi on the Island of Iwo Jima, which is now commemorated in a statue at the Iwo Jima Memorial adjoining Arlington National Cemetery.

Ralph Waldo Emerson, writing 50 years after the battles of Lexington and Concord, wrote:

> "By the rude bridge that arched the flood
> Their flag to April's breeze unfurled
> Here once the embattled farmers stood
> And fired the shot heard 'round the world."

Oliver Wendell Holmes, Senior, celebrated the flag that had flown on "Old Ironsides" during the War of 1812, and John Greenleaf Whittier made Barbara Frietchie's devotion to the "silken scarf" in the teeth of Stonewall Jackson's ominous threats the central theme of his familiar poem. John Philip Sousa's "Stars and Stripes Forever" and George M. Cohan's "It's a Grand Old Flag" are musical celebrations of the flag familiar to adults and children alike. Francis Scott Key's "Star Spangled Banner" is the country's national anthem.

While most of the artistic evocations of the flag occur in the context of times of national struggle, and correspondingly greater dependence on the flag as a symbol of national unity, the importance of the flag is by no means limited to the field of hostilities. The United States flag flies over every federal courthouse in our Nation, and is prominently displayed in almost every federal, state, or local public building throughout the land. It is the one visible embodiment of the authority of the National Government, through which the laws of the Nation and the guarantees of the Constitution are enforced.

It is not empty rhetoric to say that the United States Constitution, even the First and Fourteenth Amendments under which Goguen seeks to upset his conviction, does not invariably in the world of practical affairs enforce itself. Going back no further than the memories of most of us presently alive, the United States flag was carried by federal troops summoned by the President to enforce decrees of federal courts in Little Rock, Arkansas, in 1957, and in Oxford, Mississippi, in 1962.

The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion. But if the Government

may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I see no reason why it may not, for all of the reasons mentioned, create a similar governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood—a history compiled by generations of our forebears and contributed to by streams of immigrants from the four corners of the globe, which has traveled a course since the time of this country's origin that could not have been "foreseen . . . by the most gifted of its begetters."

The permissible scope of government regulation of this unique physical object cannot be adequately dealt with in terms of the law of private property or by a highly abstract, scholastic interpretation of the First Amendment. Massachusetts has not prohibited Goguen from wearing a sign sewn to the seat of his pants expressing in words his low opinion of the flag, of the country, or anything else. It has prohibited him from wearing there a particular symbol of extraordinary significance and content, for which significance and content Goguen is in no wise responsible. The flag of the United States is not just another "thing," and it is not just another "idea"; it is not primarily an idea at all.

Here Goguen was, so far as this record appears, quite free to express verbally whatever views it was he was seeking to express by wearing a flag sewn to his pants, on the streets of Leominster or in any of its parks or commons where free speech and assembly were customarily permitted. He was not compelled in any way to salute the flag, pledge allegiance to it, or make any

affirmative gesture of support or respect for it such as would contravene *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624 (1943). He was simply prohibited from impairing the physical integrity of a unique national symbol which has been given content by generations of his and our forebears, a symbol of which he had acquired a copy. I believe Massachusetts had a right to enact this prohibition.

Syllabus

MAYOR OF PHILADELPHIA *v.* EDUCATIONAL EQUALITY LEAGUE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1264. Argued December 10, 1973—Decided March 25, 1974

The Mayor of Philadelphia is empowered by the city charter to appoint a Nominating Panel, which in turn submits to him nominees to fill vacancies on the School Board. The Panel consists of 13 members. The Mayor must appoint four members from the citizenry at large; each of the remaining nine must be the highest ranking officer of one of nine designated categories of citywide organizations. A new Panel is convened in every odd-numbered year. Respondents brought this action for declaratory and injunctive relief charging that Mayor Tate had violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against Negroes in appointments to the 1971 Panel. Following hearings, the District Court found that respondents had failed to prove racial discrimination and dismissed their complaint. The Court of Appeals reversed, concluding that respondents had established an unrebutted prima facie case of unlawful exclusion of Negroes from consideration for service on the 1971 Panel. Although Tate was succeeded, while the case was *sub judice*, by Mayor Rizzo (as to whose Panel appointment practices the record is silent), the court directed the issuance of certain injunctive relief against Rizzo with regard to the 1973 Panel and future Panels. *Held:*

1. The Mayor's principal argument, that federal courts may not interfere with the discretionary appointment powers of an elected executive officer, is of greater importance than was accorded it by the Court of Appeals, but the argument need not be addressed here since the record is devoid of reliable proof of racial discrimination. Pp. 613–616.

2. The Court of Appeals' finding of racial discrimination rests on ambiguous testimony as to a statement in 1969 by then Mayor Tate with regard to the 1969 School Board, not the 1971 Panel; the unawareness of certain organizations on the part of a city official who did not have final authority over the challenged appointments; and racial-composition percentage comparisons the

District Court correctly rejected as meaningless in the context of this case. The Court of Appeals therefore erred in overturning the District Court's findings and conclusions. Pp. 616–621.

3. The Court of Appeals erred in ordering injunctive relief against Mayor Rizzo with regard to the 1973 Panel and future Panels since the record speaks solely to the appointment practices of Tate, his predecessor, who left office in 1972. Pp. 621–623.

4. The principal issue throughout this litigation has been whether Mayor Tate violated the Fourteenth Amendment. There is no basis for remanding the case to the District Court for resolution of peripheral state law issues under that court's pendent jurisdiction or, alternatively, for abstention so that the case may be tried anew in a state court. Pp. 623–629.

472 F. 2d 612, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, and in Part II of which DOUGLAS, J., joined, *post*, p. 633.

John Mattioni argued the cause and filed briefs for petitioner.

Edwin D. Wolf argued the cause and filed a brief for respondents.

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1965 the voters of Philadelphia approved a public education supplement to their city charter establishing the present structure of the Philadelphia Board of Education (the School Board or Board). The supplement, which appears as Art. XII of the city charter,[1] vests in the Mayor a double appointment power with regard to the School Board. The Mayor appoints the nine

[1] The relevant provisions of Art. XII of the Philadelphia Home Rule Charter are set forth as an appendix, *infra*, p. 629 *et seq.*

members of the Board, but he is assisted in that task by another entity that he also appoints, the Educational Nominating Panel (the Nominating Panel or Panel). The function of the Panel is to seek out qualified candidates for service on the School Board by polling civic organizations and the citizenry at large, to interview those candidates, to deliberate on their qualifications, and to submit selected nominees to the Mayor. The Panel submits three nominees for every vacancy on the Board. In his discretion, the Mayor may request an additional three nominees per vacancy. The Mayor must then make appointments to the School Board from among the nominees submitted by the Panel.

The Nominating Panel consists of 13 members. Under the terms of the city charter, the Mayor appoints four members of the Panel from the citizenry at large. Each of the remaining members must be the highest ranking officer of one of nine categories of citywide organizations or institutions, such as a labor union council, a commerce organization, a public school parent-teachers association, a degree-granting institution of higher learning, and the like.[2] Although the city charter describes with

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[2] Section 12–206 (b) of Art. XII of the Philadelphia Home Rule Charter provides:

"Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

"(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

"(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

"(3) a public school parent-teachers association,

"(4) a community organization of citizens established for the purpose of improvement of public education,

substantial specificity the nine categories of organizations or institutions whose leaders may serve on the Nominating Panel, the charter does not designate any particular organization or institution by name. Accordingly, it is possible for more than one such citywide entity to qualify under any given category.

The members of the Nominating Panel serve two-year terms. A new Panel is appointed and convened in every odd-numbered year, when, in the ordinary course, three vacancies occur on the School Board.[3] Thus, since 1965 there have been five Panels. Mayor James J. H. Tate, whose term expired in 1972, appointed the 1965, 1967, 1969, and 1971 Panels. The present Mayor, Frank Rizzo, appointed the 1973 Panel.

Respondents include the Educational Equality League,[4] the president of the League, another citizen of Philadelphia, and two students attending the city's public schools. Shortly after Mayor Tate's appointment

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"(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

"(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

"(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

"(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and

"(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City."

[3] The Mayor must also convene the Nominating Panel whenever a vacancy occurs on the School Board due to resignation, removal, or other unexpected event.

[4] The Educational Equality League is a nonprofit corporation devoted to safeguarding the educational rights of all Philadelphia citizens regardless of race. It was founded in 1932 and presently has approximately nine hundred members.

of the 1971 Nominating Panel, respondents filed this suit as a class action in the United States District Court for the Eastern District of Pennsylvania, relying on 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3). The gravamen of their complaint, which named the Mayor of Philadelphia and the Nominating Panel as defendants, was that Mayor Tate had violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against Negroes in his appointments to the 1971 Panel. Respondents sought an injunction barring the 1971 Panel from submitting nominees for the Board to the Mayor and a declaratory judgment that Mayor Tate had violated the Constitution. They also requested an order directing the Mayor to appoint a Nominating Panel "fairly representative of the racial composition of the school community."

Respondents did not challenge the racial composition of the School Board, which consisted of two Negroes and seven whites when respondents filed their complaint and which now consists of three Negroes and six whites.[5] They did not allege that the 1971 Panel discriminated in its submission of School Board nominees to the Mayor.[6] Such an attack would have been difficult to

[5] *Educational Equality League* v. *Tate*, 333 F. Supp. 1202, 1204 (ED Pa. 1971); Tr. of Oral Arg. 14. In their complaint respondents alleged that Mayor Tate had denied Negroes "proper representation" on the School Board. But respondents have not pursued this contention at any stage of this suit.

[6] Counsel for respondents commented at oral argument that respondents "are not in any way attacking the actions of the panel." Tr. of Oral Arg. 44. See *id.*, at 24. This apparently means only that respondents do not contend that the 1971 Panel in fact excluded Negroes from consideration in recommending School Board nominees to the Mayor. It does not mean that respondents do not seek to undo what the Panel has done. Indeed, respondents have sought relief that would invalidate the nominations made by the Panel, on the theory that the Panel was selected in violation of the Constitu-

mount in any event. Of the nine nominees submitted to the Mayor by the 1971 Panel, four were Negroes and five were whites.[7] Moreover, respondents did not dispute the validity of the qualifications set forth in the city charter with regard to the Nominating Panel. Finally, despite the prayer in their complaint for an order directing the appointment of a Panel "fairly representative of the racial composition of the school community . . . ," respondents disclaimed any effort to impose a racial quota on the Mayor in his appointments to the Panel.[8] Respondents sought solely to establish that the Mayor unconstitutionally excluded qualified Negroes from consideration for membership on the Nominating Panel and to remedy that alleged defect prospectively as well as retrospectively.[9]

Following two days of hearings, the District Court dismissed respondents' complaint. *Educational Equality League* v. *Tate*, 333 F. Supp. 1202 (ED Pa. 1971). In its findings of fact, the court noted that approximately 34% of the population of Philadelphia and approximately 60% of the students attending the city's various schools were Negroes. *Id.*, at 1202–1204. The court found the following racial composition of the Nominating

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tion and that its actions, although not discriminatory, are voidable. See nn. 9, 12, *infra*.

[7] *Educational Equality League* v. *Tate*, *supra*, at 1204.

[8] Tr. of Oral Arg. 25. See *Educational Equality League* v. *Tate*, 472 F. 2d 612, 616 (CA3 1973).

[9] Although respondents' suit is addressed to the Nominating Panel, the relief they seek would have an impact on the School Board as well. In order to cure any taint deriving from the allegedly unlawful selection of the 1971 Panel, respondents take the view that the federal courts should remove from the Board all persons nominated by that Panel. Tr. of Oral Arg. 37, 43–44. Given the racial mix of the present Board, this would require the removal of Negroes as well as whites. *Id.*, at 44.

Panels from 1965 to 1971: the 1965 Panel had 10 whites and three Negroes; the 1967 Panel had 11 whites and two Negroes; the 1969 Panel had 12 whites and one Negro; and the 1971 Panel had 11 whites and two Negroes.[10] *Id.*, at 1204. The court further found that "several organizations reflecting the views and participation of the black community" could qualify as organizations whose highest ranking officers might serve on the Nominating Panel. *Ibid.* The court also found that Deputy Mayor Zecca, the person assigned by Mayor Tate to assist in selecting qualifying organizations and institutions, at the time of the hearing was unaware of the existence of many of these "black organizations." *Ibid.*

On the basis of its finding of fact, the District Court concluded that respondents had failed to prove that the 1971 Panel was appointed in violation of the Fourteenth Amendment. It held that differences between the percentage of Negroes in the city's population (34%) or in the student body of the public school system (60%) and the percentage of Negroes on the 1971 Nominating Panel (15%) had no significance. *Id.*, at 1205–1207. In large part this was because the number of positions on the Panel was too small to provide a reliable sample; the addition or subtraction of a single Negro meant an 8% change in racial composition. *Id.*, at 1206. The court also rejected as unreliable data submitted by respondents in an effort to show that Mayor Tate's appointments to various positions in the city government other than the Panel reflected a disproportionately low

[10] Mayor Tate's appointments to the 1971 Panel initially consisted of 12 whites and one Negro. However, after Mayor Tate selected the president of a particular citywide organization but before the 1971 Panel convened, the leadership of the organization changed hands, and its white president was replaced by a Negro. The Mayor then reaffirmed his selection of that organization, which produced the 11-to-2 racial mix of the 1971 Panel.

percentage of Negroes and a pattern of discrimination. *Ibid.* Moreover, the court dismissed as inadmissible hearsay a 1969 newspaper account of an alleged statement by Mayor Tate that at that time he would appoint no more Negroes to the School Board. *Ibid.*

The Court of Appeals for the Third Circuit reversed. *Educational Equality League* v. *Tate*, 472 F. 2d 612 (1973).[11] Relying on statistical data about the Panel rejected by the District Court and going outside that court's findings of fact in other respects, the Court of Appeals concluded that respondents had established an unrebutted prima facie case of unlawful exclusion of Negroes from consideration for service on the 1971 Panel. *Id.*, at 618. Moreover, although the Mayor's office had changed hands while the case was *sub judice* and although there was nothing in the record addressed to the appointment practices of the new Mayor with regard to the Nominating Panel, the Court of Appeals directed the issuance of extensive injunctive relief against the new Mayor. *Id.*, at 619. In particular, the Court of Appeals ordered the District Court to undertake an ongoing supervision of the new Mayor's appointments to the 1973 Panel and future Panels. *Ibid.*[12]

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[11] The Court of Appeals held that the Nominating Panel is not a "person" within the meaning of 42 U. S. C. § 1983, and it therefore affirmed the District Court's dismissal of the complaint as to the Panel. 472 F. 2d, at 614, nn. 1 and 4. Respondents do not seek review of this holding, and we do not address it.

[12] The Court of Appeals remanded to the District Court the question of whether those persons appointed to the School Board from among the nominees submitted by the 1971 Panel should be removed from office. *Id.*, at 618 n. 20. In an unsuccessful petition for rehearing filed with the Court of Appeals, respondents requested the court to modify its opinion "and specifically direct the District Court to use appropriate equitable remedies to assure that all members of the School Board who were appointed through the unconstitutional processes described in this case, be promptly

We granted the Mayor's petition for certiorari. 411 U. S. 964 (1973). We conclude that the Court of Appeals erred in overturning the District Court's findings and conclusions. We also hold that it erred in ordering prospective injunctive relief against the new Mayor in a case devoted exclusively to the personal appointment policies of his predecessor.

I

The Mayor's principal contention is that judicial review of the discretionary appointments of an executive officer contravenes basic separation-of-powers principles. The Mayor cites cases concerning discretionary appointments in the Federal Executive Branch, such as *Marbury* v. *Madison*, 1 Cranch 137 (1803), and *Myers* v. *United States*, 272 U. S. 52 (1926). He notes that Pennsylvania, like the Federal Government, has a tripartite governmental structure, and he argues that the principles shaping the appropriate scope of judicial review are the same at the state level as at the federal level.

Neither the District Court nor the Court of Appeals addressed this argument at length. The District Court expressed its "reservations" about exerting control over "an elected chief executive in the exercise of his discretionary appointive power. . . ," 333 F. Supp., at 1206, but that court based its dismissal of respondents' complaint on the absence of proof of discrimination. The Court of Appeals brushed aside the "reservations" of the District Court, concluding that the Nominating Panel was not intended to operate as part of the Mayor's staff and thus that the appointments were not discre-

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replaced by persons appointed as a result of a nominating process which conforms to the requirements of the Fourteenth Amendment, these equitable remedies to take into account the necessity of having an operating school board at all times."

tionary. 472 F. 2d, at 617. And, although nine of the seats on the Panel are subject to restrictive qualifications embodied in the city charter, which are not challenged by respondents, the Court of Appeals proceeded as though this were a case where access to participation in a governmental or other entity or function is open to all citizens equally. Drawing by analogy from cases dealing with such incidents of citizenship as jury service and the right to nondiscrimination in employment, *e. g., Turner* v. *Fouche,* 396 U. S. 346 (1970), and *Smith* v. *Yeager,* 465 F. 2d 272 (CA3), cert. denied, *sub nom. New Jersey* v. *Smith,* 409 U. S. 1076 (1972), the court declared that "a prima facie case is established by a demonstration that blacks were under-represented [on the Panel] and that there was an opportunity for racial discrimination." 472 F. 2d, at 618.

We disagree with the Court of Appeals' conclusion that the appointments at issue are not discretionary. The court's view that the Panel is not a part of the staff of the mayor is not self-evident, as we understand the functions of the Panel. But in any event this is irrelevant to whether the Mayor's power to appoint the Panel is discretionary. Executive officers are often vested with discretionary appointment powers over officials who by no stretch of the imagination are members of the staff of the appointing officer. The appointment of judges is a familiar example. Likewise, the appointments to the Panel are discretionary by any reasonable measure. With regard to the four seats on the Panel devoted to the citizenry at large, the city charter holds the Mayor accountable only at the polls. And, although the charter narrows the Mayor's range of choice in filling the other nine seats, it remains true that the final selection of the membership of the Panel rests with the Mayor, subject always to the oversight of the voters.

It is also our view that the Court of Appeals did not assign appropriate weight to the constitutional considerations raised by the Mayor. To be sure, the Mayor's reliance on federal separation-of-powers precedents is in part misplaced, because this case, unlike those authorities, has nothing to do with the tripartite arrangement of the Federal Constitution.[13] But, to the degree that the principles cited by the Mayor reflect concern that judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency, they are in point. There are also delicate issues of federal-state relationships underlying this case. The federalism questions are made particularly complex by the interplay of the Equal Protection Clause of the Fourteenth Amendment, with its special regard for the status of the rights of minority groups and for the role of the Federal Government in protecting those rights. The difficulty of the issues at stake has been alluded to by the Court, without elaboration, as recently as in *Carter* v. *Jury Comm'n of Greene County,* 396 U. S. 320 (1970). *Carter* concerned a state governor's alleged discriminatory exclusion of Negroes in his discretionary appointments to a county jury commission. The Court found on the record an absence of proof of discrimination, but it nevertheless recognized "the problems that would be involved in a federal court's ordering the Governor of a State to exercise his discretion in a particular way . . . ." *Id.*, at 338.[14]

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[13] This is not to say, of course, that the State of Pennsylvania may not pattern its government after the scheme set forth in the Federal Constitution or in any other way it sees fit. The Constitution does not impose on the States any particular plan for the distribution of governmental powers. See *Sweezy* v. *New Hampshire,* 354 U. S. 234, 256 (1957) (Frankfurter, J., concurring).

[14] In a concurring opinion in *Carter,* Mr. Justice Black revealed

Were we to conclude that respondents had established racial discrimination in the selection process for the Panel, we would be compelled to address the "problems" noted in *Carter, supra,* and raised by the Mayor. We need not go so far, however, because we find that this case founders on an absence of proof, even under the approach taken by the Court of Appeals.

II

The Court of Appeals bottomed its conclusion that the Fourteenth Amendment had been violated on three indicia, only one of which was based on a finding by the District Court. Whether taken singly or in combination, these factors provide no adequate basis for the court's conclusion that respondents had established a prima facie case of racial discrimination.

First, the Court of Appeals relied on an alleged statement by Mayor Tate in 1969 that in filling the vacancies then open on the *School Board* he would appoint no Negroes in addition to the two already on it. 472 F. 2d, at 615–616. Respondents presented two items as evidence of this statement. During cross-examination of Deputy Mayor Zecca, counsel for respondents directed Mr. Zecca's attention to a 1969 newspaper article dealing with the alleged statement. Deputy Mayor Zecca denied the accuracy of the newspaper account; [15] the

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that for him these "problems," as the Court put it, were conclusive. "In my judgment the Constitution no more grants this Court the power to compel a governor to appoint or reject a certain individual or a member of any particular group than it grants this Court the power to compel the voters of a State to elect or defeat a particular person or a member of a particular group." 396 U. S., at 341. Mr. Justice Black's views have not, however, been adopted by the Court.

[15] The interchange between counsel for respondents and Mr. Zecca concerning the 1969 statement, App. 91a–93a, was as follows:

"BY MR WOLF:

"Q. Mr. Zecca, we were discussing earlier a statement by Mayor

District Court ruled that the newspaper account was inadmissible hearsay.[16] The Court of Appeals made no mention of this newspaper account. Rather, although noting that the District Court had made no finding on the subject, the court focused on the testimony of one of respondents' witnesses that Mayor Tate had made the 1969 statement.[17] The court apparently assumed the

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Tate in 1969 that he would not appoint any additional Negroes to the School Board and you said you didn't recall that statement.

"A. I said I don't think that he made such a statement.

"Q. Well, all right.

"May I show you a very bad copy of a page of the Philadelphia Inquirer, Saturday, May 3, 1969, and the article says he indicated, referring to the Mayor, he would not appoint another Negro to the Board because the Negro community has good representation in the two Negroes now serving on the Board.

"Do you recall that article?

. . . . .

"THE WITNESS: I don't recall the article specifically but it doesn't say he is not going to name another member.

"It said that he indicated that he wouldn't name another member; and this is, of course, the reporter's version of this, but the quote said the Negro community has good representation in the two Negroes now serving on the Board.

"They may have asked him whether he was going to appoint any more Negroes to the Board and he said the Negro community has good representation on the Board as it is; just like it has excellent representation right in this story.

"BY MR. WOLF:

"Q. You don't recall, however, this having happened?

"A. No."

[16] 333 F. Supp., at 1206.

[17] Under direct examination by respondents' counsel, the witness testified:

"At that time [in 1969] the Mayor made a public statement that he was not going to appoint any more Negroes to the Board because, in his feeling, they had adequate representation and that he was going to appoint someone from the nominees to the Board of Education." App. 41a.

truth of the statement, for it declared that the testimony was made "without contradiction or objection . . . ." [18]

In our view, the Court of Appeals' reliance on the alleged 1969 statement was misplaced. Assuming the admissibility and reliability of such double hearsay,[19] we are unable to conclude that an ambiguous statement purportedly made in 1969 with regard to the racial composition of the then School Board proves anything with regard to the Mayor's motives two years later in appointing the 1971 Nominating Panel. The Court of Appeals noted that if the Mayor had in 1969 decided to exclude Negro nominees from appointment to the Board, "an inference may be drawn that the Mayor in similar manner excluded blacks from consideration as members

[18] 472 F. 2d, at 616. The testimony was in fact contradicted by Deputy Mayor Zecca while under cross-examination by respondents' counsel. See n. 15, *supra*.

[19] There is some question in the record whether respondents' witness' knowledge of the 1969 statement derived from the 1969 newspaper account that the District Court ruled inadmissible hearsay or from an independent source. At oral argument, counsel for respondents informed the Court that the witness giving the testimony had heard the statement on television, although counsel conceded that this had not been made clear in the record. Tr. of Oral Arg. 31. Whether the testimony reflected the newspaper account or a television report, it was nonetheless hearsay. The Court of Appeals made no effort to determine whether the testimony met any recognized exception to the general rule that hearsay is inadmissible.

The dissenting opinion, based in part on this single ambiguous piece of testimony, argues that this "highly probative evidence" was not hearsay. *Post*, at 644. It may have been admissible for what it was worth as an exception to the hearsay rule, but *hearsay* it certainly was—and its probative value was so dubious that the District Court ignored it. Mayor Tate was not called as a witness by either side and accordingly did not testify. Thus, it is hardly surprising that "nowhere in this record can one find a denial by Mayor Tate that he did not say what the testimony indicated." *Post*, at 645.

of the 1971 Panel." 472 F. 2d, at 616 n. 9. That inference is supposition. It cannot be viewed as probative of a future intent to discriminate on the basis of race with regard to a different governmental entity. Furthermore, it is refuted by the fact that the Mayor later appointed Negroes to the 1971 Panel and, for that matter, to the School Board itself.

Second, the Court of Appeals cited the District Court's finding that Deputy Mayor Zecca had been unaware of many "black-oriented organizations" that could qualify under the categories of organizations and institutions set out in the city charter. *Id.*, at 616. The court thought that, given Mr. Zecca's important position in the appointment process in 1971, his ignorance would "support an inference that the selection process had a discriminatory effect." *Id.*, at n. 13. This is another speculative inference. Deputy Mayor Zecca did not make the appointments to the Panels. That task belonged to Mayor Tate. It is unlikely that an elected mayor would be ignorant of any viable citywide organization or institution, particularly if he had held office for a number of years. Thus Deputy Mayor Zecca's unfamiliarity with certain organizations may not be imputed automatically to the official holding the appointment power. Moreover, there has been no showing in this record that Mr. Zecca's unawareness of organizations or institutions was restricted to what the Court of Appeals referred to as "black-oriented organizations." *Id.*, at 616. The Deputy Mayor may well have been equally uninformed of the existence of many other Philadelphia organizations and groups.

As a third indicator of the exclusion of Negroes, the Court of Appeals again went outside the District Court's findings. As noted earlier, the District Court rejected as unreliable, percentage comparisons of the racial com-

position of the Panel and of the population of Philadelphia. 333 F. Supp., at 1206, 1207. The Court of Appeals thought it unfortunate that "the parties did not introduce the expert testimony of a statistician on whether the frequency of black appointments to the 13-member Panel fell outside the range to be expected were race not a factor. . . ," 472 F. 2d, at 618, but nevertheless found the small proportion of Negroes on the Panel "significant." *Ibid.* This led the court to conclude that "the small proportion of blacks on the Panel points toward the possibility of discrimination." *Ibid.*

Statistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination in access to service on governmental bodies, particularly where, as in the case of jury service, the duty to serve falls equally on all citizens. *E. g., Carter* v. *Jury Comm'n of Greene County,* 396 U. S. 320 (1970); *Hernandez* v. *Texas,* 347 U. S. 475 (1954); *Avery* v. *Georgia,* 345 U. S. 559 (1953). See *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 805 (1973) (employment discrimination). But the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning in the context of this case. Respondents do not challenge the qualifications for service on the Panel set out in the charter, whereby nine of the 13 seats are restricted to the highest ranking officers of designated categories of citywide organizations and institutions. Accordingly, this is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded. At least with regard to nine seats on the Panel and assuming, *arguendo,* that percentage comparisons are meaningful in a case involving discretionary appointments, the relevant universe for comparison purposes consists of the highest ranking officers of the categories of

organizations and institutions specified in the city charter, not the population at large. The Court of Appeals overlooked this distinction. Furthermore, the District Court's concern for the smallness of the sample presented by the 13-member Panel was also well founded. The Court of Appeals erred in failing to recognize the importance of this flaw in straight percentage comparisons.

In sum, the Court of Appeals' finding of racial discrimination rests on ambiguous testimony as to an alleged statement in 1969 by then Mayor Tate with regard to the 1969 School Board, not the 1971 Panel; the unawareness of certain organizations on the part of a city official who did not have final authority over or responsibility for the challenged appointments; and racial-composition percentage comparisons that we think were correctly rejected by the District Court as meaningless. In our view, this type of proof is too fragmentary and speculative to support a serious charge in a judicial proceeding.[20]

III

The Court of Appeals prefaced its discussion of appropriate relief by noting that it would be "the district court's function to determine the precise nature

[20] We share the view expressed in the dissent that facts in a case like the instant one, "when seen through the eyes of judges familiar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them." *Post,* at 644. That is one reason why we believe that the Court of Appeals, "with only the printed page before [it] . . . ," erred in reversing the District Court. The judge most "familiar with the context in which [the facts] occurred . . ." was obviously the District Judge, since he heard and viewed the testimony and other evidence presented. Nothing in our opinion should be seen as detracting from the salutary principle that great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances. *E. g., White* v. *Regester,* 412 U. S. 755, 769–770 (1973).

of the relief to which [respondents] are entitled." 472 F. 2d, at 618. Nevertheless, the court held, in part, that the District Court "should enjoin the present Mayor from discriminating in regard to the 1973 or future Panels and should require that before the 1973 Panel is selected, the Mayor or his staff submit to the court evidence that organizations in the black community . . . have received proper consideration." *Id.*, at 619. (Footnote omitted.)

Mayor Tate was succeeded by Mayor Rizzo on January 3, 1972. The Court of Appeals issued its opinion on January 11, 1973. Accordingly, the injunctive orders mandated by the court with regard to the 1973 and future Panels would have run against Mayor Rizzo, not Mayor Tate. As its sole reason for directing such relief against Mayor Rizzo, the Court of Appeals noted that Mr. Zecca continued as Deputy Mayor under the Rizzo administration. *Id.*, at 619 n. 21. But petitioner alleges, and respondents do not deny, that under Mayor Rizzo's stewardship, Mr. Zecca no longer has any responsibility with regard to Panel appointments. Moreover, the entire case has been focused on the appointments made by Mayor Tate. Nothing in the record speaks to the appointment policies of Mayor Rizzo with regard to the Panel. Thus, the record does not support the premise that Mayor Rizzo's appointment record for the Panel will track that of his predecessor.

Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor. *E. g., Spomer* v. *Littleton*, 414 U. S. 514 (1974). The Court of Appeals did not have the benefit of such findings at the time it instructed

the District Court to enter injunctive relief against Mayor Rizzo with regard to future Panels. The Court of Appeals therefore erred in its decision on remedies, as well as in concluding that respondents had established a violation of the Fourteenth Amendment.

IV

We turn, finally, to the dissent's argument that this case should be remanded to the District Court for resolution of state law issues under the court's pendent jurisdiction or, in the alternative, for abstention so that the case may be tried from scratch in state court. This approach ignores what the parties have briefed and argued before us, espouses on behalf of respondents state law claims of barely colorable relevance to the instant suit, and would produce a result inconsistent with a commonsense application of the pendent jurisdiction and abstention doctrines.

As the dissent concedes, *post*, at 642, its state law arguments were neither raised in the petition, argued in the briefs, nor articulated in oral argument before this Court. To address them would require us to disregard the admonition of Supreme Court Rule 23.1 (c) that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." See also, *e. g.*, *Mazer* v. *Stein*, 347 U. S. 201, 206 n. 5 (1954); *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 357 n. 2 (1940); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177–178 (1938). Moreover, the assertion that pendent jurisdiction is appropriate and that pendent state claims should be decided first presumes that the state claims have color and make it possible for the case to be "decided without reference to questions arising under the Federal Constitution . . . ." *Siler* v. *Louisville & Nashville R. Co.*,

213 U. S. 175, 193 (1909). That is not true here. In their complaint, respondents set out the following four points of state law and no others: that the 1971 Panel was convened on May 28, whereas the Charter required May 25; that the Mayor appointed the chairman of the Panel, although the Charter allegedly restricts that appointment responsibility to the Panel itself; that one of the Mayor's appointees was not the highest ranking officer of the organization he represented; and that the Mayor appointed certain city officials to the Panel, in alleged contravention of the Charter. A decision for respondents on all of these issues would not have approached resolving the case nor would it have provided a basis for granting the relief to which respondents laid claim. These state law claims were wholly tangential to the principal theme of respondents' lawsuit—an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. It is hardly surprising that respondents have not pursued these claims at either stage of appellate review. In fact, respondents scarcely addressed them in the District Court.

At the opening of the evidentiary hearings, the District Court asked counsel for respondents to describe the basis of the suit. Counsel responded that "the single issue in the case, as we have presented it, is whether there has been racial discrimination in violation of the Fourteenth Amendment in the composition of the Nominating Panel." Tr., Aug. 25, 1971, p. 4. There could be no clearer statement that a litigant's case turns on federal, rather than state, law. And respondents presented their case, as they had drafted their complaint, essentially as an exposition of federal law. To ignore all of this and to compel the District Court now to decide nondispositive state law questions would require a unique reading of the pendent jurisdiction doctrine.

Despite the language of the complaint, respondents' counsel's characterization of the suit before the District Court, and the almost exclusively federal character of the record, the dissent attributes to respondents an independent state law argument that the charter requires "a balanced racial composition on the Panel *as a whole*. . . ." (Emphasis added.) *Post*, at 638. In our view, this is a misreading of the record. Midway through the hearing, the District Court asked respondents whether they were asserting a claim under the language of the charter. Respondents' counsel replied in a manner that makes clear that he viewed the charter as merely supportive of the federal law claim and as a part only of a general "picture" or "image" of racial discrimination, not as an independent requirement of racial balance on the Panel as a whole.[21]

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[21] The relevant interchange was as follows:

"THE COURT. Do I understand you to say that it is your interpretation of the wording of the charter in connection with the makeup of the panel that it should be representative of the community generally? Is that what you are saying?

"MR. WOLF. The language is 'represent adequately the entire community,' and what I want to try to make clear in the course of my presentation is that we are not going around looking for a hook to hang our case on.

"We expect to present to you a picture, and we think that each of these items will fit into the picture, and paint an image of racial discrimination.

"We think that one of the pieces that will be in that picture is the statutory context, which is that this committee, this panel, should represent adequately the entire community. We are not arguing that that means X number of whathaveyou; we are just saying that that is relevant.

"If it weren't there, maybe there would be a stronger argument to be made that you should not expect a large number of Blacks there, but it is supposed to represent adequately the entire community, and that means something. It doesn't mean anything

A reluctance by respondents to assert an independent claim that the charter requires racial balance on the whole Panel is not surprising if one focuses on the language of the charter itself. The only conceivably pertinent provision is § 12–206 (c):

> "*In order to represent adequately the entire community,* the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large." (Emphasis added.)

As should be immediately apparent, the emphasized phrase, on which the dissent relies and which it apparently views as a requirement of racial balance, *speaks only to the four at-large seats.* The phrase does not address the nine seats restricted to the head of designated categories of citywide organizations and thus plainly does not address the Panel "as a whole." Thus, assuming the language is capable of carrying the meaning that the dissent would import to it and overlooking the fact that respondents did not set it out as an independent ground in their complaint or elsewhere, the provision is simply incapable of resolving a lawsuit addressed at all 13 seats on the Panel. As the District Court noted, "failing to appoint at-large members to adequately represent the entire community [is] not relevant in determining whether racial discrimination was involved with the appointments [to the Panel] . . . ." 333 F. Supp., at 1207.[22]

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exactly, but it means something. It points you in a direction to suggest that you should find—

"THE COURT. And this is one of the sticks in the bundle that I should weigh.

"MR. WOLF. That's right. You should find some Blacks on there under the statute." Tr., Aug. 25, 1971, pp. 75–76.

[22] The dissent also refers to a statement by the chairman of the commission that drafted the Panel with regard to a "balanced cross section of the entire community . . . ." The statement by the

We also believe that the dissent's view of pendent jurisdiction as something akin to subject matter jurisdiction that may be raised *sua sponte* at any stage and that is capable of aborting prior federal court proceedings is a misreading of the law. "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Mine Workers* v. *Gibbs,* 383 U. S. 715, 726 (1966). See 6 C. Wright & A. Miller, Federal Practice and Procedure 813 (1971). To argue that the doctrine requires us to wipe out three levels of federal court litigation of a federal law issue on the off chance that a peripheral state law claim might have merit ignores the Court's recognition that the doctrine's "justification lies in considerations of judicial economy, convenience and fairness to litigants . . . ." *Gibbs, supra,* at 726.[23]

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chairman relied on by the dissent was coupled with the thought that one of the commission's principal purposes was to preserve the Mayor's accountability at the polls for his appointments. The commission apparently believed that the appropriate check on the Mayor's actions was the court of public opinion. Moreover, it is instructive to quote the chairman's statement. After noting that the Panel should serve as a substitute for public election of the School Board, the chairman said:

"It follows that the panel's composition should be so arranged in the charter that it can always constitute a balanced representation or cross-section of the people of the entire community—all of the community's ethnic, racial, economic, or geographic elements and segments."

To convert that statement, as would the dissent, into nothing more than a mandate for racial balance between Negroes and whites is to disregard wholly what the chairman actually said.

[23] Assuming, *arguendo,* that there is substance to the state claims perceived by the dissent, there would still be serious question about the appropriateness of pendent jurisdiction. The dissent concedes that "the sufficiency of the evidence to support [respondents' federal case] is arguable . . . ." *Post,* at 644. The dissent is, therefore, urging avoidance by a district court of a federal claim in favor of

The dissent suggests in the alternative that the District Court be directed to abstain while the parties start this case all over again in state courts. This proposal comes nearly three years after the filing of the complaint and would produce delay attributable to abstention that the Court in recent years has sought to minimize. See, *e. g., England* v. *Medical Examiners*, 375 U. S. 411, 425–426 (1964) (DOUGLAS, J., concurring). And abstention would be pointless since the state issues put forward by the dissent are plainly insufficient to merit such treatment. Moreover, the dissent's theme of the "paramount concern of avoiding constitutional questions, where possible . . ." strikes a particularly jarring note in a civil rights case in which the plaintiffs asserted that "the single issue . . . is whether there has been racial discrimination in violation of the Fourteenth Amendment . . . ." Although we have no occasion to decide the issue here, there is substantial authority for the proposition that abstention is not favored in an equal protection, civil rights case brought as was this one under 42 U. S. C. § 1983 and 28 U. S. C. § 1343.[24]

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state law matters in a case where the federal issue is dubious yet is the only basis for federal jurisdiction. This amounts to an argument that the state tail should wag the federal dog, *e. g.*, H. Hart & H. Wechsler, The Federal Courts and the Federal System 925 (2d ed. 1973), and we do not view it as an efficacious application of the pendent jurisdiction doctrine. *Alma Motor Co.* v. *Timken Co.*, 329 U. S. 129 (1946), on which the dissent relies in concluding that this case should be remanded for resolution of state issues, was a case in which the alternative ground for decision was a *federal* statute over which a district court would have jurisdiction without regard to the presence of federal constitutional issues. It plainly is not in point here. In the instant case, the alternative ground championed by the dissent is not by itself capable of conferring federal jurisdiction.

[24] See, *e. g., McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Harrison* v. *NAACP*, 360 U. S. 167, 180 (1959) (DOUGLAS, J., joined

We are in general accord, of course, with the dissent's view of the importance of the constitutional decision-avoidance principles articulated by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345–348 (1936). But those standards are susceptible of misuse.[25] And we think that to commence relitigation of this case on an insubstantial state issue abandoned by the parties would be a serious abuse of the *Ashwander* standards. There simply is not "present some other ground upon which the case may be disposed of." *Id.*, at 347.

The judgment is reversed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Philadelphia Home Rule Charter

ARTICLE XII
PUBLIC EDUCATION

CHAPTER 1
THE HOME RULE SCHOOL DISTRICT

Section 12–100. The Home Rule School District.

A separate and independent home rule school district is hereby established and created to be known as "The School District of Philadelphia."

Section 12–101. The New District to Take Over All Assets and Assume All Liabilities of the Predecessor School District.

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by Warren, C. J., and BRENNAN, J., dissenting); ALI Study of the Division of Jurisdiction Between State and Federal Courts § 1371 (g), commentary at 297 (1969).

[25] See Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Col. L. Rev. 1, 16–17 (1964).

The home rule school district shall

(a) succeed directly the now existing school district for all purposes, including, but not limited to, receipt of all grants, gifts, appropriations, subsidies or other payments;

(b) take over from the now existing school district all assets, property, real and personal, tangible and intangible, all easements and all evidences of ownership in part or in whole, and all records, and other evidences pertaining thereto; and

(c) assume all debt and other contractual obligations of the now existing school district, any long term debt to be issued, secured and retired in the manner now provided by law.

CHAPTER 2

THE BOARD OF EDUCATION

Section 12–200. The Board Created; Its Function.

There shall be a Board of Education of the School District of Philadelphia which shall be charged with the administration, management and operation of the home rule school district.

Section 12–201. Members of the Board; Method of Selection.

There shall be nine members of the Board of Education who shall be appointed by the Mayor from lists of names submitted to him by the Educational Nominating Panel....

Section 12–202. Eligibility for Board Membership.

Members of the Board of Education shall be registered voters of the City. No person shall be eligible to be appointed . . . to more than two full six-year terms.

Section 12–203. Terms of Board Members.

The terms of members of the Board of Education shall begin on the first Monday in December and shall be six

years except that (1) of the first members of the Board appointed . . . , three shall be appointed . . . for terms of two years, three for terms of four years, and three for terms of six years . . . .

Section 12–204. Removal of Members of the Board.

Members of the Board of Education may be removed as provided by law.

Section 12–205. Vacancies on the Board.

A vacancy in the office of member of the Board of Education shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died or resigned. If a member of the Board is removed from office, the resulting vacancy shall be filled as provided by law.

Section 12–206. Educational Nominating Panel; Method of Selection.

(a) The Mayor shall appoint an Educational Nominating Panel consisting of thirteen (13) members. Members of the Panel shall be registered voters of the City and shall serve for terms of two years from the dates of their appointment.

(b) Nine members of the Educational Nominating Panel shall be the highest ranking officers of City-wide organizations or institutions which are, respectively:

(1) a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes,

(2) a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry,

(3) a public school parent-teachers association,

(4) a community organization of citizens established for the purpose of improvement of public education,

(5) a federation, council, or other organization of non-partisan neighborhood or community associations,

(6) a league, association, or other organization established for the purpose of improvement of human and inter-group relations,

(7) a non-partisan committee, league, council, or other organization established for the purpose of improvement of governmental, political, social, or economic conditions,

(8) a degree-granting institution of higher education whose principal educational facilities are located within Philadelphia, and

(9) a council, association, or other organization dedicated to community planning of health and welfare services or of the physical resources and environment of the City.

(c) In order to represent adequately the entire community, the four other members of the Educational Nominating Panel shall be appointed by the Mayor from the citizenry at large.

(d) In the event no organization as described in one of the clauses (1) through (9) of subsection (b) exists within the City, or in the event there is no such organization any one of whose officers is a registered voter of the City, the Mayor shall appoint the highest ranking officer who is a registered voter of the City from another organization or institution which qualifies under another clause of the subsection.

(e) A vacancy in the office of member of the Educational Nominating Panel shall be filled for the balance of the unexpired term in the same manner in which the member was selected who died, resigned, or was removed.

(f) The Educational Nominating Panel shall elect its own officers and adopt rules of procedure.

Section 12–207. The Educational Nominating Panel; Duties and Procedure.

(a) The Mayor shall appoint and convene the Educational Nominating Panel (1) not later than May twenty-fifth of every odd-numbered year, and (2) whenever a vacancy occurs in the membership of the Board of Education.

(b) The Panel shall within forty (40) days submit to the Mayor three names of qualified persons for every place on the Board of Education which is to be filled. If the Mayor wishes an additional list of names, he shall so notify the Panel within twenty (20) days. Thereupon the Panel shall within thirty (30) days send to the Mayor an additional list of three qualified persons for each place to be filled. The Mayor shall within twenty (20) days make an appointment . . . .

. . . . . .

(d) The Educational Nominating Panel shall invite business, civic, professional, labor, and other organizations, as well as individuals, situated or resident within the City to submit for consideration by the Panel the names of persons qualified to serve as members of the Board of Education.

(e) Nothing herein provided shall preclude the Panel from recommending and the Mayor from appointing or nominating persons who have previously served on any board of public education other than the Board of Education created by these charter provisions.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, and with whom MR. JUSTICE DOUGLAS joins in Part II, dissenting.

I

Although the majority describes the "gravamen" of the respondents' complaint as grounded on the Equal

Protection Clause of the Fourteenth Amendment, respondents equally contended that the racially discriminatory appointment of members to the Educational Nominating Panel violated "the express provisions and intended purpose of the Educational Supplement" to the Philadelphia Home Rule Charter.[1] The action sought injunctive and declaratory relief under 42 U. S. C. § 1983, and jurisdiction was invoked under 28 U. S. C. § 1343 (3).

The District Court, after trial at which evidence was developed on both the constitutional and state claims, decided the constitutional claim adversely to the respondents. As to the state claim, the court stated:

> "Further, plaintiffs would have us construe Section 12–206 (c) of the Educational Supplement to hold that the phrase 'representative of the community' refers to racial balance. However, the interpretation of this statute would more properly be decided by the State courts, and we take no position thereto."[2] *Educational Equality League* v. *Tate*, 333 F. Supp. 1202, 1206–1207 (ED Pa. 1971).

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[1] This was a "short and plain statement of the claim," and was a general assertion that there had been racially discriminatory appointments in violation of the Charter. As the Court stated in *Conley* v. *Gibson*, 355 U. S. 41, 48 (1957), "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." A fair reading of the complaint shows that this general claim was supported by allegations of racial discrimination in the body of the complaint and that other violations of the Supplement were asserted "[i]n addition" to the allegations of racial discrimination.

[2] As to another subsidiary state law point, the court stated:

"Similarly, while it is clear that the Mayor has not appointed the chief executive officer of the various organizations selected for representation on the Panel as required by the Educational Supplement,

The Court of Appeals reversed on the constitutional ground, noting that "[i]n view of the result reached on plaintiffs' federal claims, the district court declined to exercise pendent jurisdiction over plaintiffs' claim that the Mayor had also violated state law—namely, various provisions of the Educational Supplement—in selecting Panel Members." *Educational Equality League* v. *Tate*, 472 F. 2d 612, 616 n. 15 (CA3 1973).

Although the court did not directly reach the state claim, it thought that the legislative history of the Educational Supplement "serves as the background for the facts of which plaintiffs complain," *id.*, at 615, particularly the evidence that the chairman of the Educational Home Rule Charter Commission, which drafted the Educational Supplement, contemplated that the composition of the Panel would "constitute a balanced representation or cross-section of the people of the entire community—all of the community's ethnic, racial, economic, or geographic element and segments." *Id.*, at 614–615.

There is no question in this case that the District Court had jurisdiction over this § 1983 action under § 1343 (3), since the equal protection claim was clearly substantial. *Hagans* v. *Lavine*, *ante*, p. 528. It is equally clear that if the pendent claim were a federal statutory one, the constitutional issue should not be reached if the statutory claim was dispositive. *Id.*, at 543. The statement of this principle in *Hagans*, and the cases on which it relied, *California Human Resources Dept.* v. *Java*, 402 U. S. 121, 124 (1971); *Dandridge* v. *Williams*, 397 U. S. 471, 475–476 (1970); *Rosado* v. *Wyman*, 397 U. S. 397, 402 (1970); *King* v. *Smith*, 392 U. S. 309 (1968), are ultimately premised on what has come to be known as the rule of necessity, of avoiding resolution of contro-

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such violations have no bearing on the charges of racial discrimination and should also be decided by the State courts."

versies on constitutional grounds where possible. *Ashwander* v. *TVA*, 297 U. S. 288, 341 (1936) (Brandeis, J., concurring). Mr. Justice Brandeis stated the rule as follows:

> "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191; *Light* v. *United States*, 220 U. S. 523, 538." *Id.*, at 347.

In *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), a state order regulating rates was attacked as unconstitutional, under the Fourteenth Amendment, on due process and equal protection grounds, as well as under Art. IV, § 4. The complaint also challenged the validity of the order under a state statute. The Circuit Court had invalidated the state regulation on equal protection and due process grounds. This Court began by noting that there was no question of the federal court's jurisdiction by virtue of the federal questions. The Court, however, invalidated the regulation on state grounds, declaring this preferable to an unnecessary determination of federal constitutional questions:

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the

> order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record." 213 U. S., at 193.

This course was taken despite the fact that the Court was without benefit of a construction of the statute by the highest state court of Kentucky. *Id.*, at 194. This method of adjudication "avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy." C. Wright, Federal Courts 63 (2d ed. 1970). See H. Hart & H. Wechsler, The Federal Courts and the Federal System 922 (2d ed. 1973).

The policy of directly proceeding to a local law issue to avoid deciding a constitutional question, ruled upon in *Siler*, and which achieved doctrinal status in *Ashwander*, is "well settled." *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629 (1946). Since the District Court and Court of Appeals passed by the state law claim, and directly proceeded to the federal constitutional issue, I would vacate the judgment of the Court of Appeals and remand to the District Court for assessment of the state law claim.[3]

The basic relief sought by respondents was to bar the 1971 Panel appointed by Mayor Tate from submitting nominees for the Board to the Mayor, and an order directing the Mayor to appoint a Nominating Panel "fairly representative of the racial composition of the school community." This relief would be equally avail-

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[3] This case raises entirely separate issues than were posed in *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), where a state claim was pendent to a federal statutory claim. Under such circumstances, the *Ashwander* doctrine is inapplicable, since there is no federal constitutional claim, and once having decided the federal claim, upon which jurisdiction is premised, the court must determine whether it is proper to resolve the pendent state claim as well.

able as a remedy for violations by the Mayor of the Educational Supplement.

If the District Court had proceeded to the state law claim, it might have decided that it was without merit, or even perhaps frivolous, in which case it would, in any event, have been required to answer the constitutional question. Perhaps if this Court believed the state court claim were of a truly insubstantial nature, the suggestion for a remand might appear not to be worth the candle, and productive of unnecessary delay. I do not believe this to be the case, however.

The respondents' view of state law was that the Mayor, here with the assistance of Deputy Mayor Zecca, was required to compile a list of all organizations which qualified under the nine categories set up by the city charter, and from this group to select the chief executive officer of one of those organizations in each category with the view of achieving a balanced racial composition on the Panel as a whole. This view was supported by the fact that the chairman of the Educational Home Rule Charter Commission, which drafted the Supplement, stated that the composition of the Panel should constitute a balanced cross section of the entire community, on racial, as well as other grounds. Minutes from the meetings of the Charter Commission were relied upon to support this reading of the charter.

On the other hand, petitioner reads the charter quite differently. Deputy Mayor Zecca testified that the description of certain categories almost dictated which organization was to have representation on the Nominating Panel. Category one on the Nominating Panel required representation of "a labor union council or other organization of unions of workers and employes organized and operated for the benefit of such workers and employes." Mr. Toohey, the head of the AFL–CIO

in Philadelphia, was appointed to the position. When Deputy Mayor Zecca was asked whether there was any other organization in Philadelphia which would fit this general category, he replied, "I don't believe there is another organization that would fit that category to the extent that the AFL–CIO Council operates. This is the broadest possible group." Tr., Aug. 25, 1971, p. 206. Zecca was then asked about the second category which provides for "a council, chamber, or other organization established for the purpose of general improvement and benefit of commerce and industry." The Mayor had appointed the Philadelphian who was the chief ranking officer of the Chamber of Commerce and Industry. When asked why that appointment was made, Zecca stated: "Well, the Chamber of Commerce—I think the wording of the Charter makes it almost implicit that it is referring to the Chamber of Commerce, referring to the use of the word 'chamber.' I think that these restraints, the framers of that Home Rule Supplement practically did everything but dictate exactly who they wanted to serve in those nine categories." *Id.*, at 207.

Respondents and petitioner thus squarely joined issue on the intent of the charter.[4] Respondents thought any

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[4] The general claim of discrimination was not abandoned at trial. As the transcript shows, the statutory claim remained "one of the pieces" in the "picture" of racial discrimination. After evidence was taken, respondents continued to press this claim in their post-trial brief, which stated:

"The evidence presented clearly demonstrates that the entire scheme of appointments violated the central principle of the Panel as expressed by the framers of the Supplement. It is clear from the documents introduced by the defendant that the Panel method of selecting School Board members was adopted after great consideration of a number of alternatives. It is equally clear that the Commission intended that the Panel mechanism function as a substitute for or counterpart of popular election; it should therefore

group fitting a given category should be put into a pool for that category, and then a particular group selected for each category with a view to achieving certain balances on the Panel as a whole. Evidently, the city's view was that the most representative group of the Philadelphia community in each category should be picked without regard to balancing the Panel as a whole. The balancing was already achieved through the diversity of types of organizations to be represented on the Panel. Of course, to the extent that any predominantly white group was more representative of the citizens of Philadelphia, as a whole, than any predominantly black group, this might work to minimize the number of blacks appointed to the Panel, assuming the chief executive officer of a group reflects its predominant racial composition. The resolution of this issue is far from clear, and should have been decided by the District Court without proceeding immediately to the constitutional claim.

The majority only comes to grips with the state law claim of racial discrimination in a footnote, stating: "The statement by the chairman relied on by the dissent was coupled with the thought that one of the commission's principal purposes was to preserve the Mayor's accountability at the polls for his appointments. The commission apparently believed that the appropriate check on the Mayor's actions was the court of public

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constitute a balanced representation of the people of the entire community."

The statement of counsel at the opening of the trial obviously did not fully reflect or anticipate the evidence at trial or the issues tendered and accepted by the District Court. That court, rather than deciding the state law issues as part of the constitutional claim, expressly left them for resolution in the state courts. The fact that a state law claim is presented with a constitutional argument does not remove the claim as an alternative ground of decision.

opinion." *Ante,* at 626–627, n. 22. Whether the charter intended to confine the discretion of the Mayor is a matter of state law not passed upon by the two federal courts which have reviewed this case. I see no need for this Court, which is far away from the controversy at hand, to decide the merits of the state law claim, on the basis of its own reading of the charter. The state law claim should be left, in the first instance, to the District Court.[5]

As the majority opinion indicates, one of the grounds relied upon by the Court of Appeals in finding racial discrimination in the appointment of the Panel, under the Fourteenth Amendment, was the fact that Zecca was unaware of many black organizations and institutions set out in the city charter. Wholly aside from whether the "lack of awareness" might support an inference of racial discrimination, the Court of Appeals noted that Zecca thought that only particular organizations could qualify for appointment under various charter provisions. As I read his testimony, all Zecca claimed he had to know was that the Chamber of Commerce and the AFL–CIO were the most representative trade and labor groups in the city, which automatically dictated appointment of their representatives to the Panel. I take it that, under his view of the charter, it was not necessary to proceed further. If respondents' reading of the charter requirements were to prevail over that of petitioner's, a violation

[5] In arguing that the claim was insubstantial, the majority attacks a straw man. It assumes that the claim could only have been based on § 12–206 (c) of the charter, which relates to the selection of at-large members of the Panel. But the claim advanced by respondents was that the framers of the charter intended that the nine organizational seats on the Panel, selected under § 12–206 (b), when combined with the four at-large selections, represent a racial cross section of the community.

of the state law might well give rise to the relief requested.

Of course, the District Court on remand might decide that it should leave to the state courts resolution of the state law issue, and abstain. In such event, the proper course to follow would be to retain jurisdiction over the constitutional issue pending resolution of the state claim in another forum. The decision to abstain is by no means required and whether that course meets the test of "special circumstances," see *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509 (1972), is far from certain. I raise this possibility only for the purpose of stressing that even if abstention were to be deemed appropriate, a question on which I indicate no view, the District Court should still refrain from deciding the constitutional issue. The paramount concern of avoiding constitutional questions, where possible, persists. The Court has noted that application of the abstention doctrine inevitably gives rise to delay and expense, *England* v. *Medical Examiners*, 375 U. S. 411, 418 (1964), but the policies underlying the *Ashwander* doctrine should prevail even at this late date in the litigation.

The bearing of the *Ashwander* doctrine was not raised by the parties to this litigation, either in the District Court, the Court of Appeals, or in this Court. However, this Court clearly has "the power to notice a 'plain error' though it is not assigned or specified," *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 412 (1947), and this holds true whether the error has or has not been briefed or argued in this Court. *Silber* v. *United States*, 370 U. S. 717 (1962).

In *Alma Motor Co.* v. *Timken Co.*, 329 U. S. 129 (1946), the Court of Appeals had before it not only a constitutional question which it decided, but also a nonconstitutional question, which alone would have disposed

of the appeal. The Court of Appeals ruled on the constitutional question, and it appears that at no time did any party urge that court to rule on the statutory ground. This Court granted certiorari on the constitutional issue and heard argument at the October 1944 Term on the constitutional question. After the case had been set down for further argument in the 1945 Term, the United States, which was an intervenor in the action, pointed out that the case could be decided on statutory grounds, and moved to vacate the judgment of the Court of Appeals and to remand the case to it for determination of the statutory question. The Court adopted the suggestion of the United States, relying on *Siler* and stating:

> "This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided." *Id.*, at 136.

The presence of the nonconstitutional ground had not been raised below, or in this Court until after argument, but the Court observed:

> "We agree that much time has been wasted by the earlier failure of the parties to indicate, or the Circuit Court of Appeals or this Court to see, the course which should have been followed. This, however, is no reason to continue now on the wrong course. The principle of avoiding constitutional questions is one which was conceived out of considerations of

sound judicial administration. It is a traditional policy of our courts." *Id.*, at 142.

II

Since the majority fails to accept my views on the matter of reaching the constitutional question, I feel compelled to express my thoughts on the merits of the claim of racial discrimination.

On the record in evidence before it, the Court of Appeals found that the 1971 Nominating Panel was discriminatorily chosen. Although the sufficiency of the evidence to support that conclusion is arguable, I would not substitute our own view of the facts and overturn the Court of Appeals' judgment in this respect. Negroes constituted 34% of the population, and 60% of the public school students were Negroes. The purpose of the ordinance establishing the Nominating Panel was to stimulate and invite participation by all groups in the community, including Negroes and other minorities. It is, therefore, especially significant, even from this distant vantage point, that despite the evident intent of the ordinance to have municipal authorities seek out city-wide associations and interest groups, the city official most responsible, short of the Mayor, for the composition of the Panel confessed ignorance of many of the organizations from which nominations to the Panel might have been made and which might have put forward meritorious suggestions for School Board membership. There was also highly probative evidence with respect to the Mayor's statement that he intended to appoint no more Negroes to the School Board. These facts, when seen through the eyes of judges familiar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them. Sometimes a word, a gesture

or an attitude tells a special story to those who are part of the surrounding milieu. This is one of those situations, and I would not purport to reassess the facts and overturn the considered judgment of the Court of Appeals.

The Court complains that the testimony about the Mayor's statement concerning school membership for Negroes was inadmissible hearsay and was thus entitled to no credence. *Ante*, at 618 and n. 19. But nowhere in this record can one find a denial by Mayor Tate that he did not say what the testimony indicated. His declaration that he was not going to appoint any more Negroes to the School Board was a statement of future intention and as such was quite plainly admissible in evidence.

> "[W]henever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.
>
> "The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be." *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, 295 (1892).

As an eminent commentator has observed:

> "[I]t is now clear that out-of-court statements which tend to prove a plan, design, or intention of the declarant are admissible, subject to the usual limitations as to remoteness in time and apparent sincerity common to all declarations of mental state, to prove that the plan, design, or intention of the

declarant was carried out by the declarant." C. McCormick, Evidence § 295, p. 697 (2d ed. 1972).

More importantly, the statement evidencing the Mayor's attitude toward Negroes and their appointment to the School Board was simply not hearsay. At the time that the challenged statement was assertedly made and when it was later related by the witness who saw the Mayor make it on television,[6] Mayor Tate was still in office and a party to the lawsuit. The statement was an admission on his part, and as such it was not hearsay. This elementary proposition of evidence law has most recently been recognized by the draftsmen of the Proposed Rules of Evidence for the United States Courts and Magistrates. Rule 801 (d)(2) expressly acknowledges that an admission by a party-opponent is not hearsay if the statement is offered against the party and was actually made by him in either his individual or representative capacity. The Advisory Committee's Note succinctly outlines the reasons justifying the rule:

> "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the

[6] Tr. of Oral Arg. 31.

> rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility."

The District Court, therefore, was in error in refusing to admit the Mayor's statement in evidence, and the Court of Appeals was correct in considering it and giving it the weight it deserved. Its conclusion was that the statement supported an inference that there was racial discrimination in the formation of the Nominating Panel. But this Court now says that the inference is not a strong one and is insufficient, along with the other evidence, to sustain the judgment. It is at precisely this point, however, that I would not profess superior insight as to the meaning of "local" facts and override the judgment of the Court of Appeals with respect to the issue of discrimination.

My disagreement with the Court does not go beyond what I consider its improvident exercise of a factfinding role in this particular case. I do not question the long-established principle that this Court has a special responsibility, if not an affirmative duty, to ensure by independent review of the facts that the Constitution is not frittered away.

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285 (1964).

Similarly,

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. . . . If this requires

> an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights." *Norris* v. *Alabama*, 294 U. S. 587, 589–590 (1935).

The constitutional obligation of this Court, therefore, is to scrutinize a record in a case raising federal constitutional questions with detachment and circumspection, and always with an eye toward the impact of factual determinations on the federal right asserted.

But this has never been thought to be a license to rummage through a record looking for shreds of evidence that will discredit the judgment under review and suggest a contrary conclusion. Quite assuredly, reasonable men can, will, and often should differ as to questions of fact as well as law. Likewise, the records in many cases coming to this Court contain complicated, interwoven questions of what have been designated as "law and fact." See H. Hart & H. Wechsler, *supra*, at 601–610. "[I]t is almost impossible[, however,] to conceive how this Court might continue to function effectively were we to resolve afresh the underlying factual disputes in all cases containing constitutional issues." *Time, Inc.* v. *Pape*, 401 U. S. 279, 294 (1971) (Harlan, J., dissenting).

In this case, two interrelated "factual" questions are presented: did the Mayor make the statement evidencing his attitude toward appointing Negroes to the School Board and, if so, is the inference strong enough to support the judgment of the Court of Appeals? The District Court apparently assumed the statement was made, but ruled it inadmissible hearsay that the court should not consider. The Court of Appeals, however, accepted the making of the statement and reached the conclusion, based on the statement, that "[i]f the Mayor decided, prior to receiving nominees from the Panel to exclude

black nominees from consideration, an inference may be drawn that the Mayor in similar manner excluded blacks from consideration as members of the 1971 Panel." 472 F. 2d, at 616 n. 9. The Court apparently disagrees with the unanimous Court of Appeals' assessment that the statement was ever made, but surely this is not the type of historical fact that should command this Court's attention, at least absent some unusually extraordinary or complicating factors. As for the second issue—whether the inference was strong enough to support the judgment of racial discrimination—I fail to see how we are better equipped for this determination than our counterparts on the Court of Appeals.

The District Court, having failed to consider the case with the Mayor's statement in evidence, provides no crutch for this Court. If the District Court's assessment of the presence of racial discrimination is deemed a critical factor, the proper course would be to remand the case to the District Court, rather than to reject, on its own motion, the weight given to that testimony by the Court of Appeals. In *United States* v. *Matlock*, *ante*, at 177–178, where we determined that the District Court had erroneously excluded evidence as hearsay, we determined the evidence should be admitted, but remanded the case to the District Court to determine what weight should be given to the evidence. In the present posture of this case the Court is in no position to rely on any view of the relevant and admissible facts other than its own.

I am also unconvinced that we must reverse every ultimate factual conclusion of the courts of appeals whenever we disagree with them or simply because we would not have arrived at the same conclusion had we been deciding the issue in the first instance. Where ample evidence supports the court of appeals' judgment and reasonable

men could make different assessments of the facts, there is room for deferring to the court of appeals. This is especially true where its judgment rests on "an intensely local appraisal" of the facts "in the light of past and present reality . . . ." *White* v. *Regester*, 412 U. S. 755, 769–770 (1973).

I must dissent.[7]

[7] I do agree with the Court that the remedy against the incumbent Mayor Rizzo was improvident. See *Spomer* v. *Littleton*, 414 U. S. 514 (1974).

Syllabus

EDELMAN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* JORDAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72–1410. Argued December 12, 1973—Decided March 25, 1974

Respondent brought this class action for injunctive and declaratory relief against the Illinois officials administering the federal-state programs of Aid to the Aged, Blind, and Disabled (AABD), which are funded equally by the State and Federal Governments, contending that they were violating federal law and denying equal protection of the laws by following state regulations that did not comply with the federal time limits within which participating States had to process and make grants with respect to AABD applications. The District Court by a permanent injunction required compliance with the federal time limits and also ordered the state officials to release and remit AABD benefits wrongfully withheld to all persons found eligible who had applied therefor between July 1, 1968, the date of the federal regulations, and April 16, 1971, the date of the court's preliminary injunction. The Court of Appeals affirmed, rejecting the state officials' contentions that the Eleventh Amendment barred the award of the retroactive benefits and that the judgment of inconsistency between federal regulations and state provisions could be given only prospective effect. *Held:* The Eleventh Amendment of the Constitution bars that portion of the District Court's decree that ordered retroactive payment of benefits. Pp. 658–678.

(a) A suit by private parties seeking to impose a liability payable from public funds in the state treasury is foreclosed by the Amendment if the State does not consent to suit. Pp. 662–663.

(b) The Court of Appeals erred in holding that *Ex parte Young*, 209 U. S. 123, which awarded only prospective relief, did not preclude the retroactive monetary award here on the ground that it was an "equitable restitution," since that award, though on its face directed against the state official individually, as a practical matter could be satisfied only from the general revenues of the State and was indistinguishable from an award of damages against the State. *Ford Motor Co.* v. *Department of Treasury*,

323 U. S. 459, followed. *Shapiro* v. *Thompson*, 394 U. S. 618; *State Dept. of Health and Rehabilitation Services* v. *Zarate*, 407 U. S. 918; *Sterrett* v. *Mothers' & Children's Rights Organization*, 409 U. S. 809; *Wyman* v. *Bowens*, 397 U. S. 49, disapproved to extent that their holdings do not comport with the holding in the instant case on the Eleventh Amendment issue. Pp. 663–671.

(c) The State of Illinois did not waive its Eleventh Amendment immunity and consent to the bringing of respondent's suit by participating in the federal AABD program. *Parden* v. *Terminal R. Co.*, 377 U. S. 184, and *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, distinguished. Nor does the mere fact that a State participates in a program partially funded by the Federal Government manifest consent by the State to be sued in federal courts. Pp. 671–674.

(d) The Court of Appeals properly considered the Eleventh Amendment defense, which the state officials did not assert in the District Court, since that defense partakes of the nature of a jurisdictional bar. *Ford Motor Co.* v. *Department of Treasury*, *supra*. Pp. 677–678.

472 F. 2d 985, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined. DOUGLAS, J., *post*, p. 678, and BRENNAN, J., *post*, p. 687, filed dissenting opinions. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 688.

Robert J. O'Rourke, Deputy Attorney General of Illinois, argued the cause for petitioner. On the briefs were *William J. Scott*, Attorney General, and *Donald S. Carnow*, Special Assistant Attorney General.

Sheldon Roodman argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging affirmance were filed by *Jack Greenberg*, *Charles Stephen Ralston*, and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc., and by *Nancy Duff Levy* and *Henry A. Freedman* for the NLSP Center on Social Welfare Policy and Law, Inc.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent John Jordan filed a complaint in the United States District Court for the Northern District of Illinois, individually and as a representative of a class, seeking declaratory and injunctive relief against two former directors of the Illinois Department of Public Aid, the director of the Cook County Department of Public Aid, and the comptroller of Cook County. Respondent alleged that these state officials were administering the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with various federal regulations and with the Fourteenth Amendment to the Constitution.[1]

AABD is one of the categorical aid programs administered by the Illinois Department of Public Aid pursuant to the Illinois Public Aid Code, Ill. Rev. Stat., c. 23, §§ 3–1 through 3–12 (1973). Under the Social Security Act, the program is funded by the State and the Federal Governments. 42 U. S. C. §§ 1381–1385.[2] The Department of Health, Education, and Welfare (HEW),

[1] In his complaint in the District Court, respondent claimed that the Illinois Department of Public Aid was not complying with federal regulations in its processing of public aid applications, and also that its refusal to process and allow respondent's claim for a period of four months, while processing and allowing the claims of those similarly situated, violated the Equal Protection Clause of the Fourteenth Amendment. Respondent asserted that the District Court could exercise jurisdiction over the cause by virtue of 28 U. S. C. §§ 1331 and 1343 (3) and (4). Though not briefed by the parties before this Court, we think that under our decision in *Hagans* v. *Lavine*, *ante*, p. 528, the equal protection claim cannot be said to be "wholly insubstantial," and that therefore the District Court was correct in exercising pendent jurisdiction over the statutory claim.

[2] Effective January 1, 1974, this AABD program was replaced by a similar program. See 42 U. S. C. §§ 801–805 (1970 ed., Supp. II).

which administers these payments for the Federal Government, issued regulations prescribing maximum permissible time standards within which States participating in the program had to process AABD applications. Those regulations, originally issued in 1968, required, at the time of the institution of this suit, that eligibility determinations must be made by the States within 30 days of receipt of applications for aid to the aged and blind, and within 45 days of receipt of applications for aid to the disabled. For those persons found eligible, the assistance check was required to be received by them within the applicable time period. 45 CFR § 206.10 (a)(3).[3]

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[3] Title 45 CFR § 206.10 (a)(3) (1973) provides in pertinent part: "(a) *State plan requirements.* A State plan . . . shall provide that:

. . . . . .

"(3) A decision shall be made promptly on applications, pursuant to reasonable State-established time standards not in excess of:

"(i) 45 days [for aid to aged and blind] . . . ; and

"(ii) 60 days . . . [for aid to disabled]. Under this requirement, the applicant is informed of the agency's time standard in acting on applications, which covers the time from date of application under the State plan to the date that the assistance check, or notification of denial of assistance or change of award, or the eligibility decision with respect to medical assistance, is mailed to the applicant or recipient. . . ."

When originally issued in 1968 the regulations provided that the applications for aid to the aged and blind be processed within 30 days and that aid to the disabled be processed within 45 days of receipt. They also provided that the person determined to be eligible must *receive* his assistance check within the applicable time period. The amendment to 60 days for aid to the disabled occurred in 1971, as did the change to require mailing instead of receipt of the assistance check within the applicable time period; effective Oct. 15, 1973, the time for processing aged and blind applications became 45 days.

In addition, at the time of institution of the suit, 45 CFR § 206.10 (a)(6) (1972) provided in pertinent part:

During the period in which the federal regulations went into effect, Illinois public aid officials were administering the benefits pursuant to their own regulations as provided in the Categorical Assistance Manual of the Illinois Department of Public Aid.[4] Respondent's complaint charged that the Illinois defendants, operating under those regulations, were improperly authorizing grants to commence only with the month in which an application was approved and not including prior eligibility months for which an applicant was entitled to aid under federal law. The complaint also alleged that the Illinois defendants were not processing the applications within the applicable time requirements of the federal regulations; specifically, respondent alleged that his own application

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"(6) Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than the date of authorization of payment . . . ."

[4] The Illinois regulations, found in the Illinois Categorical Assistance Manual of the Illinois Department of Public Aid, provide in pertinent part:

"4004.1

"Except for [disability] cases which have a time standard of 45 days, the time standard for disposition of applications is 30 days from the date of application to the date the applicants are determined eligible and the effective date of their first assistance or are determined ineligible and receive a notice of denial of assistance. . . .

. . . . .

"8255. Initial Awards

"Initial awards may be new grants, reinstatements, or certain types of resumptions. They can be effective for the month in which Form FO–550 is signed but for no prior period except [under conditions not relevant to this case].

"8255.1 New Grants

"A new grant is the first grant authorized after an application has been accepted in a case which has not previously received assistance under the same assistance program. It may be authorized for the month in which Form FO–550 is signed but not for any prior period unless it meets [exceptions not relevant to this case]."

for disability benefits was not acted on by the Illlinois Department of Public Aid for almost four months. Such actions of the Illinois officials were alleged to violate federal law and deny the equal protection of the laws. Respondent's prayer requested declaratory and injunctive relief, and specifically requested "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld."

In its judgment of March 15, 1972, the District Court declared § 4004 of the Illinois Manual to be invalid insofar as it was inconsistent with the federal regulations found in 45 CFR § 206.10 (a)(3), and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants. The District Court, in paragraph 5 of its judgment, also ordered the state officials to "release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 [the date of the federal regulations] and April 16, 197[1] [the date of the preliminary injunction issued by the District Court] and were determined eligible . . . ." [5]

[5] Paragraph 5 of the District Court's judgment provided:

"That the defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, his agents, including all of the County Departments of Public Aid in the State of Illinois, and employees, and all persons in active concert and participation with them, are hereby enjoined to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illlinois who applied between July 1, 1968 and April 16, 1972 [*sic*] [should read "1971"], and were determined eligible, as follows:

"(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, AABD assistance for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement to AABD became effective;

"(b)(i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not

On appeal to the United States Court of Appeals for the Seventh Circuit, the Illinois officials contended, *inter alia,* that the Eleventh Amendment barred the award of

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mailed within forty-five days from the date of application, AABD assistance for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

"(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, AABD assistance for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

"These AABD benefits shall be mailed to those persons currently receiving AABD within eight months with an explanatory letter, said letter having been first approved by plaintiffs' attorney. Any AABD benefits received pursuant to this paragraph shall not be deemed income or resources under Article III of the Illinois Public Aid Code.

"For those persons not presently receiving AABD:

"(a) A certified letter (return receipt requested), said letter having been first approved by plaintiffs' attorney, shall be sent to the last known address of the person, informing him in concise and easily understandable terms that he is entitled to a specified amount of AABD benefits wrongfully withheld, and that he may claim such amount by contacting the County Department of Public Aid at a specified address, within 45 days from the receipt of said letter.

"(b) If the County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. Persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision."

Paragraph 6 of the District Court's judgment provided:

"Within 15 days from the date of this decree, defendant EDWARD T. WEAVER, Director, Illlinois Department of Public Aid, shall submit to the court and the plaintiffs' attorney a detailed statement as to the method for effectuating the relief required by paragraph 5, supra, of this Decree. Any disputes between the parties as to whether the procedures and steps outlined by the

retroactive benefits, that the judgment of inconsistency between the federal regulations and the provisions of the Illinois Categorical Assistance Manual could be given prospective effect only, and that the federal regulations in question were inconsistent with the Social Security Act itself. The Court of Appeals rejected these contentions and affirmed the judgment of the District Court. *Jordan* v. *Weaver*, 472 F. 2d 985 (1973).[6] Because of an apparent conflict on the Eleventh Amendment issue with the decision of the Court of Appeals for the Second Circuit in *Rothstein* v. *Wyman*, 467 F. 2d 226 (1972), cert. denied, 411 U. S. 921 (1973), we granted the petition for certiorari filed by petitioner Joel Edelman, who is the present Director of the Illinois Department of Public Aid, and successor to the former directors sued below. 412 U. S. 937 (1973). The petition for certiorari raised the same contentions urged by the petitioner in the Court of Appeals.[7] Because we believe the Court of Appeals

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defendant WEAVER will fulfill the requirements of this Decree will be resolved by the Court."

On July 19, 1973, the author of this opinion stayed until further order of this Court these two paragraphs of the District Court's judgment. 414 U. S. 1301.

[6] Respondent appealed from the District Court's judgment insofar as it held him not entitled to receive benefits from the date of his applications (as opposed to the date of authorization of benefits as provided by the federal regulations) and insofar as it failed to award punitive damages. The Court of Appeals upheld the District Court's decision against respondent on those points and they are not at issue here. 472 F. 2d 985, 997–999.

[7] Citing *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), petitioner also contends in this Court that the Court of Appeals erred in refusing to give the District Court's judgment prospective effect only. Brief for Petitioner 37, incorporating arguments made in Pet. for Cert. 18–22. The Court of Appeals concluded that this ground was "not presented to the district judge before the entry of judgment, so that it comes too late." 472 F. 2d, at 995. The Court of Appeals went on, however, to conclude that "[e]ven if the

erred in its disposition of the Eleventh Amendment claim, we reverse that portion of the Court of Appeals decision which affirmed the District Court's order that retroactive benefits be paid by the Illinois state officials.[8]

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ground had been timely presented, defendants' contention would be meritless." *Ibid.* Noting that one of three tests established by our decision in *Huson* for determining the retroactivity of court decisions was that "the decision to be applied nonretroactively *must* establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or [have decided] an issue of first impression whose resolution was not clearly foreshadowed . . . ," *Chevron Oil Co.* v. *Huson, supra,* at 106, the Court of Appeals found that the petitioner had not satisfied this test, since the "federal time requirements for processing applications and paying eligible AABD applicants were made effective July 1, 1968, and defendants were well aware of these mandatory maximum permissible time standards." 472 F. 2d, at 996.

In light of our disposition of this case on the Eleventh Amendment issue we see no reason to address this contention.

[8] Former Title 42 U. S. C. § 1382 (a)(8) provided in pertinent part:

"(a) Contents.

"A State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind, or disabled and medical assistance for the aged, must—

. . . . . .

"(8) provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals."

HEW, pursuant to authority granted to it by 42 U. S. C. § 1302, has promulgated regulations, see n. 3, *supra,* which require that decisions be made promptly on applications within 45 days for the aged and blind and within 60 days for the disabled, and that initiation of payments to the eligible be made within the same periods. Petitioner renews in this Court the contention made in the Court of Appeals that these time limitations in the regulations are inconsistent with the statute and therefore an unlawful abuse of the rule-making authority. Brief for Petitioner 37, incorporating arguments made in Pet. for Cert. 22–28. Specifically, petitioner argues

The historical basis of the Eleventh Amendment has been oft stated, and it represents one of the more dramatic examples of this Court's effort to derive meaning from the document given to the Nation by the Framers nearly 200 years ago. A leading historian of the Court tells us:

> "The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." 1 C. Warren, The Supreme Court in United States History 91 (rev. ed. 1937).

Despite such disclaimers,[9] the very first suit entered

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that the "establishment of arbitrary [forty-five] and sixty day maximums in the HEW regulations for determination of eligibility and initiation of payments without taking into consideration the efficient administration of the Act by the State agencies is inconsistent with the 'reasonable promptness' requirement and must therefore be declared unlawful . . . ." Pet. for Cert. 23. The Court of Appeals rejected this contention, holding that "these time requirements, binding on state welfare officials, are an appropriate interpretation of the Congressional mandate of 'reasonable promptness.'" 472 F. 2d, at 996. We agree with the Court of Appeals.

[9] While the debates of the Constitutional Convention themselves do not disclose a discussion of the question, the prevailing view at the time of the ratification of the Constitution was stated by various of the Framers in the writings and debates of the period. Examples of these views have been assembled by Mr. Chief Justice Hughes: ". . . Madison, in the Virginia Convention, answering objections to the ratification of the Constitution, clearly stated his view as to the purpose and effect of the provision conferring jurisdiction over

in this Court at its February Term in 1791 was brought against the State of Maryland by a firm of Dutch bankers as creditors. *Vanstophorst* v. *Maryland*, see 2 Dall.

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controversies between States of the Union and foreign States. That purpose was suitably to provide for adjudication in such cases if consent should be given but not otherwise. Madison said: 'The next case provides for disputes between a foreign state and one of our states, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made.' 3 Elliot's Debates, 533.

"Marshall, in the same Convention, expressed a similar view. Replying to an objection as to the admissibility of a suit by a foreign state, Marshall said: 'He objects, in the next place, to its jurisdiction in controversies between a state and a foreign state. Suppose, says he, in such a suit, a foreign state is cast; will she be bound by the decision? If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce.' 3 Elliot's Debates, 557.

"Hamilton, in The Federalist, No. 81, made the following emphatic statement of the general principle of immunity: 'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of that plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action

401 and Warren, *supra*, at 91 n. 1. The subsequent year brought the institution of additional suits against other States, and caused considerable alarm and consternation in the country.

The issue was squarely presented to the Court in a suit brought at the August 1792 Term by two citizens of South Carolina, executors of a British creditor, against the State of Georgia. After a year's postponement for preparation on the part of the State of Georgia, the Court, after argument, rendered in February 1793, its short-lived decision in *Chisholm* v. *Georgia*, 2 Dall. 419. The decision in that case, that a State was liable to suit by a citizen of another State or of a foreign country, literally shocked the Nation. Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams. Unchanged since then, the Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has con-

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independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable.'" *Monaco* v. *Mississippi*, 292 U. S. 313, 323–325 (1934) (footnotes omitted).

sistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. *Hans* v. *Louisiana,* 134 U. S. 1 (1890); *Duhne* v. *New Jersey,* 251 U. S. 311 (1920); *Great Northern Life Insurance Co.* v. *Read,* 322 U. S. 47 (1944); *Parden* v. *Terminal R. Co.,* 377 U. S. 184 (1964); *Employees* v. *Department of Public Health and Welfare,* 411 U. S. 279 (1973). It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459 (1945), the Court said:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.,* at 464.

Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Great Northern Life Insurance Co.* v. *Read, supra; Kennecott Copper Corp.* v. *State Tax Comm'n,* 327 U. S. 573 (1946).

The Court of Appeals in this case, while recognizing that the *Hans* line of cases permitted the State to raise the Eleventh Amendment as a defense to suit by its own citizens, nevertheless concluded that the Amendment did not bar the award of retroactive payments of the statutory benefits found to have been wrongfully withheld. The Court of Appeals held that the above-cited cases, when read in light of this Court's landmark decision in *Ex parte Young,* 209 U. S. 123 (1908), do not preclude

the grant of such a monetary award in the nature of equitable restitution.

Petitioner concedes that *Ex parte Young, supra,* is no bar to that part of the District Court's judgment that prospectively enjoined petitioner's predecessors from failing to process applications within the time limits established by the federal regulations. Petitioner argues, however, that *Ex parte Young* does not extend so far as to permit a suit which seeks the award of an accrued monetary liability which must be met from the general revenues of a State, absent consent or waiver by the State of its Eleventh Amendment immunity, and that therefore the award of retroactive benefits by the District Court was improper.

Ex parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect. But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.

But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite a different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman. Addressing himself to a similar situation in *Rothstein* v. *Wyman,* 467 F. 2d 226

(CA2 1972), cert. denied, 411 U. S. 921 (1973), Judge McGowan [10] observed for the court:

> "It is not pretended that these payments are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. . . .
>
> "It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force." 467 F. 2d, at 236–237 (footnotes omitted).

We agree with Judge McGowan's observations. The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself, *Ford Motor Co.* v. *Department of Treasury, supra,* than it does the prospective injunctive relief awarded in *Ex parte Young.*

The Court of Appeals, in upholding the award in this case, held that it was permissible because it was in the form of "equitable restitution" instead of damages, and therefore capable of being tailored in such a way as to minimize disruptions of the state program of categorical assistance. But we must judge the award actually made in this case, and not one which might have been differently tailored in a different case, and we must judge

[10] Of the Court of Appeals for the District of Columbia Circuit, sitting by designation on the Court of Appeals for the Second Circuit.

it in the context of the important constitutional principle embodied in the Eleventh Amendment.[11]

We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in *Ex parte Young* hewed to no such line. Its citation of *Hagood* v. *Southern*, 117 U. S. 52 (1886), and *In re Ayers*, 123 U. S. 443 (1887), which were both actions

[11] It may be true, as stated by our Brother DOUGLAS in dissent, that "[m]ost welfare decisions by federal courts have a financial impact on the States." *Post*, at 680–681. But we cannot agree that such a financial impact is the same where a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments as was made in the instant case. It is not necessarily true that "[w]hether the decree is prospective only or requires payments for the weeks or months wrongfully skipped over by the state officials, the nature of the impact on the state treasury is precisely the same." *Post*, at 682. This argument neglects the fact that where the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system.

As stated by Judge McGowan in *Rothstein* v. *Wyman*, 467 F. 2d 226, 235 (CA2 1972):

"The second federal policy which might arguably be furthered by retroactive payments is the fundamental goal of congressional welfare legislation—the satisfaction of the ascertained needs of impoverished persons. Federal standards are designed to ensure that those needs are equitably met; and there may perhaps be cases in which the *prompt* payment of funds wrongfully withheld will serve that end. As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear."

against state officers for specific performance of a contract to which the State was a party, demonstrate that equitable relief may be barred by the Eleventh Amendment.

As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham* v. *Richardson*, 403 U. S. 365 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing.[12] But the fiscal consequences to state

[12] The Court of Appeals considered the Court's decision in *Griffin* v. *School Board*, 377 U. S. 218 (1964), to be of like import. But as may be seen from *Griffin's* citation of *Lincoln County* v. *Luning*, 133 U. S. 529 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment. See also *Moor* v. *County of Alameda*, 411 U. S. 693 (1973). The fact that the county policies executed by the county officials in *Griffin* were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long-established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment.

treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*

But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Were we to uphold this portion of the District Court's decree, we would be obligated to overrule the Court's holding in *Ford Motor Co.* v. *Department of Treasury, supra.* There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana state officials who were charged with their collection. The taxpayer claimed that the tax

had been imposed in violation of the United States Constitution. The term "equitable restitution" would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case.

The Court of Appeals expressed the view that its conclusion on the Eleventh Amendment issue was supported by this Court's holding in *Department of Employment* v. *United States,* 385 U. S. 355 (1966). There the United States was held entitled to sue the Colorado Department of Employment in the United States District Court for refund of unemployment compensation taxes paid under protest by the American National Red Cross, an instrumentality of the United States. The discussion of the State's Eleventh Amendment claim is confined to the following sentence in the opinion:

> "With respect to appellants' contention that the State of Colorado has not consented to suit in a federal forum even where the plaintiff is the United States, see *Monaco* v. *Mississippi,* 292 U. S. 313 (1934), and *Ex parte Young,* 209 U. S. 123 (1908)." *Id.,* at 358.

Monaco v. *Mississippi,* 292 U. S. 313 (1934), reaffirmed the principle that the Eleventh Amendment was no bar to a suit by the United States against a State. *Id.,* at 329. In view of Mr. Chief Justice Hughes' vigorous reaffirmation in *Monaco* of the principles of the Eleventh Amendment and sovereign immunity, we think it unlikely that the Court in *Department of Employment* v. *United States,* in citing *Ex parte Young* as well as *Monaco,*

intended to foreshadow a departure from the rule to which we adhere today.

Three fairly recent District Court judgments requiring state directors of public aid to make the type of retroactive payment involved here have been summarily affirmed by this Court notwithstanding Eleventh Amendment contentions made by state officers who were appealing from the District Court judgment.[13] *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), is the only instance in which the Eleventh Amendment objection to such retroactive relief was actually presented to this Court in a case which was orally argued. The three-judge District Court in that case had ordered the retroactive payment of welfare benefits found by that court to have been unlawfully withheld because of residence requirements held violative of equal protection. 270 F. Supp. 331, 338 n. 5 (Conn. 1967). This Court, while affirming the judgment, did not in its opinion refer to or substantively treat the Eleventh Amendment argument. Nor, of course, did the summary dispositions of the three District Court cases contain any substantive discussion of this or any other issues raised by the parties.

This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amend-

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[13] Brief for Respondent 15–18. Decisions of this Court in which we summarily affirmed a decision of a lower federal court which ordered the payment of retroactive awards and in which the jurisdictional statement filed in this Court raised the Eleventh Amendment defense include: *State Dept. of Health and Rehabilitative Services* v. *Zarate*, 407 U. S. 918 (1972), aff'g 347 F. Supp. 1004 (SD Fla. 1971); *Sterrett* v. *Mothers' and Children's Rights Organization*, 409 U. S. 809 (1972), aff'g unreported order and judgment of District Court (ND Ind. 1972) on remand from *Carpenter* v. *Sterrett*, 405 U. S. 971 (1972); *Gaddis* v. *Wyman*, 304 F. Supp. 717 (SDNY 1969) (order at CCH Poverty Law Rep. ¶ 10,506 [1968–1971 Transfer Binder]), aff'd *per curiam sub nom. Wyman* v. *Bowens*, 397 U. S. 49 (1970).

ment aspects of such relief in a written opinion. *Shapiro* v. *Thompson* and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law.[14] Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today.

The Court of Appeals held in the alternative that even if the Eleventh Amendment be deemed a bar to the retroactive relief awarded respondent in this case, the State of Illinois had waived its Eleventh Amendment immunity and consented to the bringing of such a suit by participating in the federal AABD program. The Court of Appeals relied upon our holdings in *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), and *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959),

[14] In the words of Mr. Justice Brandeis: "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–408 (1932) (dissenting opinion) (footnotes omitted).

and on the dissenting opinion of Judge Bright in *Employees* v. *Department of Public Health and Welfare*, 452 F. 2d 820, 827 (CA8 1971). While the holding in the latter case was ultimately affirmed by this Court in 411 U. S. 279 (1973), we do not think that the answer to the waiver question turns on the distinction between *Parden, supra*, and *Employees, supra*. Both *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities. Similarly, *Petty* v. *Tennessee-Missouri Bridge Comm'n, supra*, involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.

But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent. Thus respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* and *Petty* as well.[15]

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[15] Respondent urges that the traditionally broad power of a federal court sitting as a court of equity to fashion appropriate remedies as are necessary to effect congressional purposes requires that the District Court's award of retroactive benefits be upheld. Respondent places principal reliance on our prior decisions in *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), and *Mitchell* v. *DeMario Jewelry*, 361 U. S. 288 (1960). Both cases dealt with the

The Court of Appeals held that as a matter of federal law Illinois had "constructively consented" to this suit by participating in the federal AABD program and agreeing to administer federal and state funds in compliance with federal law. Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171 (1909). We see no reason to retreat from the Court's statement in *Great Northern Life Insurance Co.* v. *Read*, 322 U. S., at 54 (footnote omitted):

> "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts. And while this Court has, in cases such as *J. I. Case Co.* v. *Borak*, 377

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power of a federal court to grant equitable relief for violations of federal law; the decision in *Mitchell* indicated that a federal court could provide equitable relief "complete . . . in light of the statutory purposes." *Id.*, at 292. Since neither of these cases involved a suit against a State or a state official, it did not purport to decide the availability of equitable relief consistent with the Eleventh Amendment.

U. S. 426 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant. Since *Employees, supra,* where Congress had expressly authorized suits against a general class of defendants and the only thing left to implication was whether the described class of defendants included States, was decided adversely to the putative plaintiffs on the waiver question, surely this respondent must also fail on that issue. The only language in the Social Security Act which purported to provide a federal sanction against a State which did not comply with federal requirements for the distribution of federal monies was found in former 42 U. S. C. § 1384 (now replaced by substantially similar provisions in 42 U. S. C. § 804), which provided for termination of future allocations of federal funds when a participating State failed to conform with federal law.[16] This provision by its terms did not authorize suit against anyone, and standing alone, fell far short of a waiver by a participating State of its Eleventh Amendment immunity.

Our Brother MARSHALL argues in dissent, and the Court of Appeals held, that although the Social Security Act itself does not create a private cause of action, the cause of action created by 42 U. S. C. § 1983, coupled with the enactment of the AABD program, and the issuance by HEW of regulations which require the States to make corrective payments after successful "fair hear-

[16] HEW sought passage of a bill in the 91st Congress, H. R. 16311, § 407 (a), which would have given it authority to require retroactive payments to eligible persons denied such benefits. The bill failed to pass the House of Representatives. See H. R. 16311, The Family Assistance Act of 1970, Senate Committee on Finance, 91st Cong., 2d Sess., C169–170 (Comm. Print Nov. 5, 1970).

ings" and provide for federal matching funds to satisfy federal court orders of retroactive payments, indicate that Congress intended a cause of action for public aid recipients such as respondent.[17] It is, of course, true that *Rosado* v. *Wyman*, 397 U. S. 397 (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States.[18] But it has not hereto-

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[17] Title 45 CFR §§ 205.10 (b)(2) and (3) provide:

"(b) *Federal financial participation.* Federal financial participation is available for the following items:

. . . . .

"(2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments.

"(3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order."

The Court of Appeals felt that § 1983, the enactment of the AABD program, and the issuance by HEW of the above regulation, indicated that Congress intended to include within the Social Security Act the remedy of "effective judicial review" and "the remedy of restoration of benefits withheld in violation of federal law." 472 F. 2d, at 994–995 and n. 15. But the adoption of regulations by HEW to permit the use of federal funds in the satisfaction of judicial awards is not determinative of the constitutional issues here presented.

[18] MR. JUSTICE MARSHALL, and both the Court of Appeals and the respondent herein, refer to language in *Rosado* v. *Wyman*, 397 U. S., at 420, to the effect that Congress in legislating the Social Security Act has not "closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." The Court in *Rosado* was concerned with the compatibility of a provision of New York law which decreased benefits to some eligible public aid recipients and amendments to the federal act which required cost-of-living increases. The case did not purport to

fore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that

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decide the Eleventh Amendment issue we resolve today. In finding the New York law inconsistent with the federal law, Mr. Justice Harlan stated:

"New York is, of course, in no way prohibited from using only *state* funds according to whatever plan it chooses, providing it violates no provision of the Constitution. It follows, however, from our conclusion that New York's program is incompatible with § 402 (a)(23), that petitioners are entitled to declaratory relief and an appropriate injunction by the District Court against the payment of *federal* monies according to the new schedules, should the State not develop a conforming plan within a reasonable period of time.

"We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. . . . We adhere to *King* v. *Smith*, 392 U. S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief and held Alabama's 'substitute father' regulation to be inconsistent with the federal statute. While *King* did not advert specifically to the remedial problem, the unarticulated premise was that the State had alternative choices of assuming the additional cost of paying benefits to families with substitute fathers or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements." *Id.*, at 420–421.

Respondent urges that this language is "tantamount to a finding that Congress conditioned the participation of a state in the categorical assistance program on the forfeiture of immunity from suit in a federal forum . . . irrespective of the relief sought, [since] the intent of Congress remains constant." Brief for Respondent 42–43. Petitioner contends that this language, coupled with the fact that the Court in *Rosado* remanded the case to the District

section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.*

Respondent urges that since the various Illinois officials sued in the District Court failed to raise the Eleventh Amendment as a defense to the relief sought by respondent, petitioner is therefore barred [19] from raising the Eleventh Amendment defense in the Court of Appeals or in this Court. The Court of Appeals apparently felt the defense was properly presented, and dealt with it on the merits. We approve of this resolution, since it has been well settled since the decision

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Court to "afford New York an opportunity to revise its program . . . or, should New York choose [not to revise its program], issue its order restraining the further use of federal monies pursuant to the present statute," 397 U. S., at 421–422, indicates that the Court felt that retroactive relief was not a permissible remedy. Brief for Petitioner 17–20. We do not regard *Rosado* as controlling either way since the Court was not faced with a district court judgment ordering retroactive payments or with a challenge based on the Eleventh Amendment.

[19] Respondent urges that the State of Illinois has abolished its common-law sovereign immunity in its state courts, and appears to argue that suit in a federal court against the State may thus be maintained. Brief for Respondent 23. Petitioner contends that sovereign immunity has not been abolished in Illinois as to this type of case. Brief for Petitioner 31–36. Whether Illinois permits such a suit to be brought against the State in its own courts is not determinative of whether Illinois has relinquished its Eleventh Amendment immunity from suit in the federal courts. *Chandler* v. *Dix,* 194 U. S. 590, 591–592 (1904).

in *Ford Motor Co.* v. *Department of Treasury, supra,* that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court:

> "[The Attorney General of Indiana] appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits. The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." 323 U. S., at 466–467.

For the foregoing reasons we decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payment of benefits found to have been wrongfully withheld. The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

Congress provided in 42 U. S. C. § 1983 that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

> stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In this class action respondent sought to enforce against state aid officials of Illinois provisions of the Social Security Act, 42 U. S. C. §§ 1381–1385, known as the Aid to the Aged, Blind, or Disabled (AABD) program.[1] The complaint alleges violations of the Equal Protection Clause of the Fourteenth Amendment and also violations of the Social Security Act. Hence § 1983 is satisfied *in haec verba,* for a deprivation of "rights" which are "secured by the Constitution and laws" is alleged. The Court of Appeals, though ruling that the alleged constitutional violations had not occurred, sustained federal jurisdiction because federal "rights" were violated. The main issue tendered us is whether that ruling of the Court of Appeals is consistent with the Eleventh Amendment.[2]

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[1] Effective January 1, 1974, this AABD program was replaced by a similar program. See 42 U. S. C. §§ 801–805 (1970 ed., Supp. II). The program in Illinois is administered by the Department of Public Aid. Ill. Rev. Stat., c. 23, §§ 3–1 to 3–12 (1973). The former program was funded in part by the State and in part by the Federal Government. 42 U. S. C. §§ 303, 304, 306, 1201–1204, 1206, 1351–1355, 1381–1385.

[2] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

As the Court, speaking through MR. JUSTICE BRENNAN, said in *Parden* v. *Terminal R. Co.,* 377 U. S. 184, 186: "Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. *Hans* v. *Louisiana,* 134 U. S. 1; *Duhne* v. *New Jersey,* 251 U. S. 311; *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, 51;

Once the federal court had jurisdiction over the case, the fact that it ruled adversely to the claimant on the constitutional claim did not deprive it of its pendent jurisdiction over the statutory claim. *United States* v. *Georgia Pub. Serv. Comm'n*, 371 U. S. 285, 287–288.

In *Ex parte Young*, 209 U. S. 123, a suit by stockholders of a railroad was brought in a federal court against state officials to enjoin the imposition of confiscatory rates on the railroad in violation of the Fourteenth Amendment. The Eleventh Amendment was interposed as a defense. The Court rejected the defense, saying that state officials with authority to enforce state laws "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.*, at 156. The Court went on to say that a state official seeking to enforce in the name of a State an unconstitutional act "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159–160.

As the complaint in the instant case alleges violations by officials of Illinois of the Equal Protection Clause of the Fourteenth Amendment, it seems that the case is governed by *Ex parte Young* so far as injunctive relief is concerned. The main thrust of the argument is that the instant case asks for relief which if granted would affect the treasury of the State.

Most welfare decisions by federal courts have a fi-

Fitts v. *McGhee*, 172 U. S. 516, 524. See also *Monaco* v. *Mississippi*, 292 U. S. 313."

nancial impact on the States. Under the existing federal-state cooperative system, a state desiring to participate, submits a "state plan" to HEW for approval; once HEW approves the plan the State is locked into the cooperative scheme until it withdraws,[3] all as described in *King* v. *Smith*, 392 U. S. 309, 316 *et seq.* The welfare cases coming here have involved ultimately the financial responsibility of the State to beneficiaries claiming they were deprived of federal rights. *King* v. *Smith* required payment to children even though their mother was cohabitating with a man who could not pass muster as a

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[3] The Social Security Act states what a "state plan" must provide. At the time this suit was brought, 42 U. S. C. § 1382 (a) provided: "A State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind, or disabled and medical assistance for the aged, must . . . .

. . . . . .

"(5) provide (A) such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan . . . ;

. . . . . .

"(8) provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals;

. . . . . .

"(13) include reasonable standards, consistent with the objectives of this subchapter, for determining eligibility for and the extent of aid or assistance under the plan."

Nearly identical provisions are now found in 42 U. S. C. § 802 (a) (1970 ed., Supp. II).

The Secretary of HEW issued mandatory federal time standard regulations. Handbook, Public Assistance Administration, pt. IV, §§ 2200 (b)(3), 2300 (b)(5); 45 CFR § 206.10 (a)(3). Illinois adopted a 30-day standard for aged and blind applicants (Ill. Categ. Assistance Manual § 4004.1) as contrasted to HEW's 60-day period, § 2200, *supra*. It is that conflict which exposes the merits of the controversy.

"parent." *Rosado* v. *Wyman*, 397 U. S. 397, held that under this state-federal cooperative program a State could not reduce its standard of need in conflict with the federal standard. It is true that *Rosado* did not involve retroactive payments as are involved here. But the distinction is not relevant or material because the result in every welfare case coming here is to increase or reduce the financial responsibility of the participating State. In no case when the responsibility of the State is increased to meet the lawful demand of the beneficiary, is there any levy on state funds. Whether the decree is prospective only or requires payments for the weeks or months wrongfully skipped over by the state officials, the nature of the impact on the state treasury is precisely the same.

We have granted relief in other welfare cases which included retroactive assistance benefits or payments. In *State Dept. of Health and Rehabilitative Services* v. *Zarate*, 407 U. S. 918, the sole issue presented to us[4] was whether the Eleventh Amendment barred a judgment against state officers for retroactive welfare assistance benefits or payments. That had been ordered by the lower court and we summarily affirmed, only MR. JUSTICE WHITE voting to note probable jurisdiction. We also summarily affirmed the judgment in *Sterrett* v. *Mothers' & Children's Rights Organization*, 409 U. S. 809, where one of the two questions[5] was whether retroactive payments of benefits violated the Eleventh Amendment. In *Wyman* v. *Bowens*, 397 U. S. 49, we affirmed a judgment

[4] The lower court's opinion is found in 347 F. Supp. 1004.

[5] The jurisdictional statement had as its second question the following:

"Whether a federal court is precluded by the Eleventh Amendment to the United States Constitution from ordering a state agency to pay money from the state treasury and from further ordering the state agency to perform certain specified acts which would otherwise be in the discretion of the agency."

where payments were awarded in spite of the argument that the order was an incursion on the Eleventh Amendment.[6] In *Shapiro* v. *Thompson*, 394 U. S. 618, we affirmed a judgment which ordered payment of benefits wrongfully withheld;[7] and while we did not specifically refer to the point, the lower court had expressly rejected the Eleventh Amendment argument.[8]

In *Gaither* v. *Sterrett*, 346 F. Supp. 1095, 1099, whose judgment we affirmed,[9] 409 U. S. 1070, the court said:

> "[T]his court would note that if defendants' position regarding the jurisdictional bar of the Eleventh Amendment is correct, a great number of federal district court judgments are void, and the Supreme Court has affirmed many of these void judgments."

The Court of Appeals for the Seventh Circuit is in line with that view; the opposed view of the Court of Appeals for the Second Circuit in *Rothstein* v. *Wyman*, 467 F. 2d 226, is out of harmony with the established law.

What is asked by the instant case is minor compared to the relief granted in *Griffin* v. *School Board*, 377 U. S. 218. In that case we authorized entry of an order putting an end to a segregated school system. We held, *inter alia*, that "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to

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[6] The lower court's opinion is found in 304 F. Supp. 717. Retroactive payments were challenged in question 2 of the jurisdictional statement.

[7] The lower court's opinion is found in 270 F. Supp. 331.

[8] *Id.*, at 338 n. 5. The award of money damages was alleged to be a violation of the Eleventh Amendment in Part V of the jurisdictional statement.

[9] The jurisdictional statement in the *Sterrett* case explicitly urged that the decree below violated the Eleventh Amendment since it would expend itself on the public treasury—the second question in the jurisdictional statement.

exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." *Id.*, at 233. We so held against vigorous contentions of the state officials that the Eleventh Amendment protected the State; and in reply we cited *Lincoln County* v. *Luning*, 133 U. S. 529, and *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573, 579, to support the proposition that "actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights." 377 U. S., at 233.

Griffin is sought to be distinguished on the ground that a "county" is not the "state" for purposes of the Eleventh Amendment. But constitutionally the county in *Griffin* was exercising state policy as are the counties here, because otherwise the claim of denial of equal protection would be of no avail.

Counties are citizens of their State for purposes of diversity of citizenship. *Bullard* v. *City of Cisco*, 290 U. S. 179; *Moor* v. *County of Alameda*, 411 U. S. 693, 718–719. And they are not States for purposes of 28 U. S. C. § 1251 (a) which gives this Court original and exclusive jurisdiction of: "(1) All controversies between two or more states. . . ." *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 98. But, being citizens of their State, suits against them by another State are in our original but not exclusive jurisdiction under 28 U. S. C. § 1251 (b)(3). *Ibid.* Yet, as agencies of the State whether in carrying out educational policies or otherwise, they are the State, as *Griffin* held, for purposes of the Fourteenth Amendment. And *Griffin*, like the present case, dealt only with liability to citizens for state policy and state action.

Yet petitioner asserts that money damages may not be awarded against state offenses, as such a judgment

will expend itself on the state treasury. But we are unable to say that Illinois on entering the federal-state welfare program waived its immunity to suit for injunctions but did not waive its immunity for compensatory awards which remedy its willful defaults of obligations undertaken when it joined the cooperative venture.[10]

It is said however, that the Eleventh Amendment is concerned, not with immunity of States from suit, but with the jurisdiction of the federal courts to entertain the suit. The Eleventh Amendment does not speak of "jurisdiction"; it withholds the "judicial power" of federal courts "to any suit in law or equity . . . against one of the United States . . . ." If that "judicial power," or "jurisdiction" if one prefers that concept, may not be exercised even in "any suit in . . . equity" then *Ex parte Young* should be overruled. But there is none eager to take the step. Where a State has consented to join a federal-state cooperative project, it is realistic to conclude that the State has agreed to assume its obligations under that legislation. There is nothing in the Eleventh Amendment to suggest a difference between suits at law and suits in equity, for it treats the two without distinction. If common sense has any role to play in constitutional adjudication, once there is a waiver of immunity it must be true that it is complete so far as effective operation of the state-federal joint welfare program is concerned.

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[10] We settled in *Rosado* v. *Wyman*, 397 U. S. 397, the question whether the grant of authority under the Social Security Act to HEW to cut off federal funds for noncompliance with statutory requirements provides the exclusive procedure and remedy for violations of the Act. We said: "We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." *Id.*, at 420.

We have not always been unanimous in concluding when a State has waived its immunity. In *Parden* v. *Terminal R. Co.*, 377 U. S. 184, where Alabama was sued by some of its citizens for injuries suffered in the interstate operation of an Alabama railroad, the State defended on the grounds of the Eleventh Amendment. The Court held that Alabama was liable as a carrier under the Federal Employers' Liability Act, saying:

> "Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act," *id.*, at 192.

The Court added:

> "Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.*, at 196.

As the Court of Appeals in the instant case concluded, Illinois by entering into the joint federal-state welfare plan just as surely "[left] the sphere that is exclusively its own." *Ibid.*

It is argued that participation in the program of federal financial assistance is not sufficient to establish consent on the part of the State to be sued in federal courts. But it is not merely participation which supports a finding of Eleventh Amendment waiver, but

participation in light of the existing state of the law as exhibited in such decisions as *Shapiro* v. *Thompson*, 394 U. S. 618, which affirmed judgments ordering retroactive payment of benefits. Today's holding that the Eleventh Amendment forbids court-ordered retroactive payments, as the Court recognizes, necessitates an express overruling of several of our recent decisions. But it was against the background of those decisions that Illinois continued its participation in the federal program, and it can hardly be claimed that such participation was in ignorance of the possibility of court-ordered retroactive payments. The decision to participate against that background of precedent can only be viewed as a waiver of immunity from such judgments.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE BRENNAN, dissenting.

This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States. Rather, the question is whether Illinois may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to respondent's claim for retroactive AABD payments. In my view Illinois may not assert sovereign immunity for the reason I expressed in dissent in *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279, 298 (1973): the States surrendered that immunity in Hamilton's words, "in the plan of the Convention," that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.*, at 319 n. 7; *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). Congressional authority to enact the Social Security Act, of which AABD is a part, former 42 U. S. C. §§ 1381–1385

(now replaced by similar provisions in 42 U. S. C. § 801–804 (1970 ed., Supp. II)), is to be found in Art. I, § 8, cl. 1, one of the enumerated powers granted Congress by the States in the Constitution. I remain of the opinion that "because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver," 411 U. S., at 300, and thus have no occasion to inquire whether or not Congress authorized an action for AABD retroactive benefits, or whether or not Illinois voluntarily waived the immunity by its continued participation in the program against the background of precedents which sustained judgments ordering retroactive payments.

I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Social Security Act's categorical assistance programs, including the Aid to the Aged, Blind, or Disabled (AABD) program involved here, are fundamentally different from most federal legislation. Unlike the Fair Labor Standards Act involved in last Term's decision in *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279 (1973), or the Federal Employers' Liability Act at issue in *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), the Social Security Act does not impose federal standards and liability upon all who engage in certain regulated activities, including often-unwilling state agencies. Instead, the Act seeks to induce state participation in the federal welfare programs by offering federal matching funds in exchange for the State's voluntary assumption of the Act's requirements. I find this basic distinction crucial: it leads me to conclude that by participation in the programs, the States waive whatever immunity they might otherwise have from federal court

orders requiring retroactive payment of welfare benefits.[1]

In its contacts with the Social Security Act's assistance programs in recent years, the Court has frequently described the Act as a "scheme of cooperative federalism." See, *e. g., King* v. *Smith,* 392 U. S. 309, 316 (1968); *Jefferson* v. *Hackney,* 406 U. S. 535, 542 (1972). While this phrase captures a number of the unique characteristics of these programs, for present purposes it serves to emphasize that the States' decision to participate in the programs is a voluntary one. In deciding to participate, however, the States necessarily give up their freedom to operate assistance programs for the needy as they see fit, and bind themselves to conform their programs to the requirements of the federal statute and regulations. As the Court explained in *King* v. *Smith, supra,* at 316–317 (citations omitted):

> "States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children [or needy aged, blind or disabled] are required to submit an AFDC [or AABD] plan for the approval of the Secretary of Health, Education, and Welfare (HEW). The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW."

So here, Illinois elected to participate in the AABD program, and received and expended substantial federal funds in the years at issue. It thereby obligated itself to comply with federal law, including the require-

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[1] In view of my conclusion on this issue, I find it unnecessary to consider whether the Court correctly treats this suit as one against the State, rather than as a suit against a state officer permissible under the rationale of *Ex parte Young,* 209 U. S. 123 (1908).

ment of former 42 U. S. C. § 1382 (a)(8) that "such aid or assistance shall be furnished with reasonable promptness to all eligible individuals." In *Townsend* v. *Swank*, 404 U. S. 282, 286 (1971), we held that participating States must strictly comply with the requirement that aid be furnished "to all eligible individuals," and that the States have no power to impose additional eligibility requirements which exclude persons eligible for assistance under federal standards. Today's decision, *ante*, at 659–660, n. 8, properly emphasizes that participating States must also comply strictly with the "reasonable promptness" requirement and the more detailed regulations adding content to it.

In agreeing to comply with the requirements of the Social Security Act and HEW regulations, I believe that Illinois has also agreed to subject itself to suit in the federal courts to enforce these obligations. I recognize, of course, that the Social Security Act does not itself provide for a cause of action to enforce its obligations. As the Court points out, the only sanction expressly provided in the Act for a participating State's failure to comply with federal requirements is the cutoff of federal funding by the Secretary of HEW. Former 42 U. S. C. § 1384 (now 42 U. S. C. § 804 (1970 ed., Supp. II)).

But a cause of action is clearly provided by 42 U. S. C. § 1983, which in terms authorizes suits to redress deprivations of rights secured by the "laws" of the United States. And we have already rejected the argument that Congress intended the funding cutoff to be the sole remedy for noncompliance with federal requirements. In *Rosado* v. *Wyman*, 397 U. S. 397, 420–423 (1970), we held that suits in federal court under § 1983 were proper to enforce the provisions of the Social Security Act against participating States. Mr. Justice Harlan, writing for the Court, ex-

amined the legislative history and found "not the slightest indication" that Congress intended to prohibit suits in federal court to enforce compliance with federal standards. *Id.*, at 422.

I believe that Congress also intended the full panoply of traditional judicial remedies to be available to the federal courts in these § 1983 suits. There is surely no indication of any congressional intent to restrict the courts' equitable jurisdiction. Yet the Court has held that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946). "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell* v. *DeMario Jewelry*, 361 U. S. 288, 291–292 (1960).

In particular, I am firmly convinced that Congress intended the restitution of wrongfully withheld assistance payments to be a remedy available to the federal courts in these suits. Benefits under the categorical assistance programs "are a matter of statutory entitlement for persons qualified to receive them." *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970). Retroactive payment of benefits secures for recipients this entitlement which was withheld in violation of federal law. Equally important, the courts' power to order retroactive payments is an essential remedy to insure future state compliance with federal requirements. See *Porter* v. *Warner Holding Co., supra*, at 400. No other remedy can effectively deter States from the strong temptation to cut

welfare budgets by circumventing the stringent requirements of federal law. The funding cutoff is a drastic sanction, one which HEW has proved unwilling or unable to employ to compel strict compliance with the Act and regulations. See *Rosado* v. *Wyman, supra,* at 426 (DOUGLAS, J., concurring). Moreover, the cutoff operates only prospectively; it in no way deters the States from even a flagrant violation of the Act's requirements for as long as HEW does not discover the violation and threaten to take such action.

Absent any remedy which may act with retroactive effect, state welfare officials have everything to gain and nothing to lose by failing to comply with the congressional mandate that assistance be paid with reasonable promptness to all eligible individuals. This is not idle speculation without basis in practical experience. In this very case, for example, Illinois officials have knowingly violated since 1968 federal regulations on the strength of an argument as to its invalidity which even the majority deems unworthy of discussion. *Ante,* at 659–660, n. 8. Without a retroactive-payment remedy, we are indeed faced with "the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them." *Jordan* v. *Weaver,* 472 F. 2d 985, 995 (CA7 1972). Like the Court of Appeals, I cannot believe that Congress could possibly have intended any such result.

Such indicia of congressional intent as can be gleaned from the statute confirm that Congress intended to authorize retroactive payment of assistance benefits unlawfully withheld. Availability of such payments is implicit in the "fair hearing" requirement, former 42 U. S. C. § 1382 (a)(4), which permitted welfare recipients to challenge the denial of assistance. The regulations

which *require* States to make corrective payments retroactively in the event of a successful fair hearing challenge, 45 CFR § 205.10 (a)(18), merely confirm the obvious statutory intent. HEW regulations also authorize federal matching funds for retroactive assistance payments made pursuant to court order, 45 CFR §§ 205.10 (b)(2), (b)(3). We should not lightly disregard this explicit recognition by the agency charged with administration of the statute that such a remedy was authorized by Congress. See *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971).

Illinois chose to participate in the AABD program with its eyes wide open. Drawn by the lure of federal funds, it voluntarily obligated itself to comply with the Social Security Act and HEW regulations, with full knowledge that Congress had authorized assistance recipients to go into federal court to enforce these obligations and to recover benefits wrongfully denied. Any doubts on this score must surely have been removed by our decisions in *Rosado* v. *Wyman, supra,* and *Shapiro* v. *Thompson,* 394 U. S. 618 (1969), where we affirmed a district court retroactive payment order. I cannot avoid the conclusion that, by virtue of its knowing and voluntary decision to nevertheless participate in the program, the State necessarily consented to subject itself to these suits. I have no quarrel with the Court's view that waiver of constitutional rights should not lightly be inferred. But I simply cannot believe that the State could have entered into this essentially contractual agreement with the Federal Government without recognizing that it was subjecting itself to the full scope of the § 1983 remedy provided by Congress to enforce the terms of the agreement.

Of course, § 1983 suits are nominally brought against state officers, rather than the State itself, and do not

ordinarily raise Eleventh Amendment problems in view of this Court's decision in *Ex parte Young*, 209 U. S. 123 (1908). But to the extent that the relief authorized by Congress in an action under § 1983 may be open to Eleventh Amendment objections,[2] these objections are waived when the State agrees to comply with federal requirements enforceable in such an action. I do not find persuasive the Court's reliance in this case on the fact that "congressional authorization to sue a class of defendants which literally includes States" is absent. *Ante*, at 672. While true, this fact is irrelevant here, for this is simply not a case "literally" against the State. While the Court successfully knocks down the strawman it has thus set up, it never comes to grips with the undeniable fact that Congress has "literally" authorized this suit within the terms of § 1983. Since there is every reason to believe that Congress intended the full panoply of judicial remedies to be available in § 1983 equitable actions to enforce the Social Security Act, I think the conclusion is inescapable that Congress authorized and the State consented to § 1983 actions in which the relief might otherwise be questioned on Eleventh Amendment grounds.

My conclusion that the State has waived its Eleventh Amendment objections to court-ordered retroactive assistance payments is fully consistent with last Term's

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[2] It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an *amicus* in this case. In view of my conclusion that any sovereign immunity which may exist has been waived, I also need not reach this issue.

decision in *Employees* v. *Department of Public Health and Welfare,* 411 U. S. 279 (1973). As I emphasized in my concurring opinion, there was no voluntary action by the State in *Employees* which could reasonably be construed as evidencing its consent to suit in a federal forum.

> "[T]he State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction . . . ." *Id.,* at 296.

A finding of waiver here is also consistent with the reasoning of the majority in *Employees,* which relied on a distinction between "governmental" and "proprietary" functions of state government. *Id.,* at 284–285. This distinction apparently recognizes that if sovereign immunity is to be at all meaningful, the Court must be reluctant to hold a State to have waived its immunity simply by acting in its sovereign capacity—*i. e.,* by merely performing its "governmental" functions. On the other hand, in launching a profitmaking enterprise, "a State leaves the sphere that is exclusively its own," *Parden* v. *Terminal R. Co.,* 377 U. S., at 196, and a voluntary waiver of sovereign immunity can more easily be found. While conducting an assistance program for the needy is surely a "governmental" function, the State here has done far more than operate its own program in its sovereign capacity. It has voluntarily subordinated its sovereignty in this matter to that of the Federal Government, and agreed to comply with the conditions imposed

by Congress upon the expenditure of federal funds. In entering this federal-state cooperative program, the State again "leaves the sphere that is exclusively its own," and similarly may more readily be found to have voluntarily waived its immunity.

Indeed, this is the lesson to be drawn from this Court's decision in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959), where the Court found that the States had waived the sovereign immunity of the Commission by joining in an interstate compact subject to the approval of Congress. The Court in *Petty* emphasized that it was "called on to interpret not unilateral state action but the terms of a consensual agreement" between the States and Congress, *id.*, at 279, and held that the States who join such a consensual agreement, "by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Id.*, at 281–282. Although the congressional intent regarding the sue-and-be-sued clause was by no means certain, the Court held that the surrounding conditions made it clear that the States accepting it waived their sovereign immunity, *id.*, at 280, especially since this interpretation was necessary to keep the compact "a living interstate agreement which performs high functions in our federalism." *Id.*, at 279.

I find the approach in *Petty* controlling here. As even the dissent in that case recognized, *id.*, at 285 (Frankfurter, J., dissenting), Congress undoubtedly has the power to insist upon a waiver of sovereign immunity as a condition of its consent to such a federal-state agreement. Since I am satisfied that Congress has in fact done so here, at least to the extent that the federal courts may do "complete rather than truncated justice," *Porter* v. *Warner Holding Co.*, 328 U. S., at 398, in § 1983 actions authorized by Congress against state welfare authorities, I respectfully dissent.

EATON *v.* CITY OF TULSA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 73-5925. Decided March 25, 1974

Petitioner was convicted of criminal contempt for referring to his alleged assailant as "chicken shit" in answering a question on cross-examination at his trial for violating a Tulsa, Oklahoma, ordinance. The Oklahoma Court of Criminal Appeals affirmed, rejecting petitioner's contention that the conviction must be taken as resting solely on the use of the expletive, and holding that since the record showed that petitioner in addition to using the expletive made "discourteous responses" to the trial judge, there was sufficient evidence upon which the trial court *could* find petitioner in direct contempt. *Held:*

1. The single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the contempt conviction, since under the circumstances it did not "constitute an imminent . . . threat to the administration of justice." *Craig* v. *Harney*, 331 U. S. 367, 376.

2. Where the trial court's judgment and sentence disclosed that the conviction rested on the use of the expletive only, the Court of Criminal Appeals, in relying on petitioner's additional "discourteous responses," denied petitioner constitutional due process in sustaining the trial court by treating the conviction as one upon a charge not made.

Certiorari granted; reversed and remanded.

PER CURIAM.

In answering a question on cross-examination at his trial, in the Municipal Court of Tulsa, Oklahoma, for violating a municipal ordinance, petitioner referred to an alleged assailant as "chicken shit." In consequence he was prosecuted and convicted under an information that charged him with "direct contempt," in violation of another Tulsa ordinance, "by his insolent behavior during open court and in the presence of [the judge],

to wit: by using the language 'chicken-shit' . . . ." The Oklahoma Court of Criminal Appeals, in an unreported order and opinion, affirmed.

This single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the conviction of criminal contempt. "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice." *Craig* v. *Harney,* 331 U. S. 367, 376 (1947). In using the expletive in answering the question on cross-examination "[i]t is not charged that [petitioner] here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties." *Holt* v. *Virginia,* 381 U. S. 131, 136 (1965); see also *In re Little,* 404 U. S. 553 (1972). In the circumstances, the use of the expletive thus cannot be held to "constitute an imminent . . . threat to the administration of justice."

In affirming, however, the Court of Criminal Appeals rejected petitioner's contention that the conviction must be taken as resting solely on the use of the expletive. Rather, that court concluded from its examination of the trial record that, in addition to the use of the expletive, petitioner made "discourteous responses" to the trial judge. The court therefore held that the conviction should be affirmed because "[c]oupling defendant's expletive with the discourteous responses, it is this Court's opinion there was sufficient evidence upon which the trial court *could* find defendant was in direct contempt of court." (Emphasis supplied.)

However, the question is not upon what evidence the trial judge *could* find petitioner guilty but upon what evidence the trial judge *did* find petitioner guilty. There

is no transcript of the contempt proceeding since the proceeding was not stenographically recorded. The trial judge did, however, enter a "Judgment and Sentence," and we read that document clearly to establish that the trial judge rested the conviction upon the use of the expletive only. For the single charge of "insolent behavior" specified in the information was "to wit: by using the language 'chicken-shit' . . . ," and the Judgment and Sentence, referring expressly to the information, records that petitioner was "duly and legally tried and convicted of *said offense*" and, further, that "the Court does now hereby adjudge and sentence the said defendant for the *said offense* by him committed." (Emphasis supplied.) The Court of Criminal Appeals thus denied petitioner constitutional due process in sustaining the trial court by treating the conviction as a conviction upon a charge not made. *Cole* v. *Arkansas*, 333 U. S. 196 (1948).*

*Assuming, *arguendo*, (1) that the information sufficiently charged petitioner for both use of the expletive and his allegedly "discourteous responses," and (2) that there was evidence of the latter offense, reversal is still required, since the record fails to "negate the possibility," *Street* v. *New York*, 394 U. S. 576, 588 (1969), that the conviction was based solely or in part on the use of the expletive. "[W]hen a single-count . . . information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Ibid.* Cf. *Stromberg* v. *California*, 283 U. S. 359 (1931); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Bachellar* v. *Maryland*, 397 U. S. 564 (1970). And this principle is not limited, nor should it be, to cases in which the conviction may have been based on protected speech. See *Williams* v. *North Carolina*, 317 U. S. 287, 291–292 (1942). Here, the "Judgment and Sentence" not only does not dispel the possibility that petitioner's conviction was based solely or partially

The motion to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment is reversed, and the case is remanded for further proceeding not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring.

I concur in the Court's *per curiam* opinion. I write briefly only to make clear my understanding of the limited scope of its holding. Whether the language used by petitioner in a courtroom during trial justified exercise of the contempt power depended upon the facts. Under the circumstances here, the imposition of a contempt sanction against petitioner denied him due process of law.

The phrase "chicken shit" was used by petitioner as a characterization of the person whom petitioner believed assaulted him. As noted in the Court's opinion, it was not directed at the trial judge or anyone officially connected with the trial court. But the controlling fact, in my view, and one that should be emphasized, is that petitioner received no prior warning or caution from the trial judge with respect to court etiquette. It may well be, in view of contemporary standards as to the use of vulgar and even profane language, that this particular petitioner had no reason to believe that this expletive would be offensive or in any way disruptive of proper courtroom decorum. Language likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances.

I place a high premium on the importance of maintaining civility and good order in the courtroom. But

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on the use of the expletive, but plainly supports the opposite conclusion.

before there is resort to the summary remedy of criminal contempt, the court at least owes the party concerned some sort of notice or warning. No doubt there are circumstances in which a courtroom outburst is so egregious as to justify a summary response by the judge without specific warning, but this is surely not such a case.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

The Court summarily reverses petitioner's conviction for contempt of court on the grounds that the expletive which petitioner used could not by itself constitute a contempt, and that the additional "discourteous responses" petitioner made to the trial judge could not be properly considered by either the Municipal Court of Tulsa or the Oklahoma Court of Criminal Appeals which affirmed petitioner's conviction. I disagree with the Court as to each of these grounds.

I

Even the Court appears to shy away from a flat rule, analogous to the hoary doctrine of the law of torts that every dog is entitled to one bite, to the effect that every witness is entitled to one free contumacious or other impermissible remark. The Court, quoting language from *Holt* v. *Virginia*, 381 U. S. 131, 136 (1965), says that " '[i]t is not charged that [petitioner] here . . . talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties.' " But we do not have any transcript of petitioner's trial for contempt, and we simply do not know whether the evidence in that trial may or may not have shown that petitioner "talked loudly" or "acted boisterously" in the course of his rather unusual colloquy with the judge. Respondent in its brief in opposition

certainly makes no concession in petitioner's favor. If, as appears likely, neither party is in a position to furnish any judicially cognizable account of the petitioner's contempt trial, this hiatus in the record cannot be filled in by what amounts to no more than speculation in favor of petitioner's position:

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 281 (1942).

See *Stroble* v. *California*, 343 U. S. 181, 198 (1952).

II

Having assumed that the "single expletive" uttered by petitioner could not by itself constitutionally constitute a contempt, the Court goes on to hold that the Court of Criminal Appeals' reliance on petitioner's discourteous additional remarks during the course of his colloquy with the trial court, amounted to "treating the conviction as a conviction upon a charge not made," in violation of *Cole* v. *Arkansas*, 333 U. S. 196 (1948). While we do not have the transcript of the contempt trial, the record does show the colloquy which occurred between petitioner and the trial judge in the Municipal Court during petitioner's trial for an alleged violation of a Tulsa ordinance. During cross-examination in response to a question asked him by the assistant city prosecutor, the following exchange occurred (emphasis supplied):

> "Q. What did you do?
>
> "A. I sensed something from behind me and I turned maybe enough to look over my shoulder. At

the time I turned and looked over my shoulder I could see this guy's face and shoulders coming at me; almost simultaneously he hit me and he knocked me over on my back a bench down. Luckily, somebody grabbed him and pulled him back, and I got up off of my back after being knocked down on my back, wrenched my elbow, got up to a vertical posture where I would have some kind of defensibility and moved up to where I had some square footing.

"Q. What's defensibility?

"A. I think that would be a place where you were able to get your feet to stand square so you would be half ready for some chicken shit that had jumped you from behind.

"THE COURT: Mr. Eaton, you will have until tomorrow morning to show me why you should not be held in direct contempt of this Court. I'm not going to put up with that kind of language in this Court.

"THE WITNESS: *That's fine. I don't feel as though I need to put up with why I received this.*

"THE COURT: Mr. Eaton, did you hear what I just said?

"THE WITNESS: Yes, sir.

"THE COURT: That kind of language you used in this Court, I will not put up with any more of that talk in this courtroom. That was not responsive to any type of question whatsoever and I'm not going to have profanity in this courtroom and you're going to be held in direct contempt of this Court unless you can show me by tomorrow morning, cause why you should not be.

"THE WITNESS: *Fine. I'm not going to show you anything in the morning any more than I can show you now, but I think me being asked to specu-*

late as to why someone would jump on me from behind is not within any kind of realm of prosecution—

"THE COURT: The Court will be in recess."

On November 6, 1972, petitioner returned to the court in response to the judge's direction, and was at that time found guilty of direct contempt of court in violation of another Tulsa ordinance. Petitioner was fined $50 plus costs. Petitioner appealed his conviction to the Court of Criminal Appeals of Oklahoma. His principal contention in that court was that the use of the expletive "chicken shit" was not directed at the trial judge, and also that the conviction for direct contempt was based solely on the use of the expletive, in violation of his First and Fourteenth Amendment rights.

The Court of Criminal Appeals affirmed the conviction in this language:

> "Counsel submits in his brief the expletive used by defendant . . . does not constitute direct contempt per se. We find the expletive to not be the only comment in question. After studying the entire portion of the record above reproduced, we note that the record clearly manifests in its entirety discourteous responses to the trial court upon the trial court's observations made during the course of trial. In *Champion* v. *State,* Okl. Cr., 456 P. 2d 571 (1969), this Court held such discourteous responses are sufficient to warrant a citation for contempt. Coupling defendant's expletive with the discourteous responses, it is this Court's opinon there was sufficient evidence upon which the trial court could find defendant was in direct contempt of court."

Yet the Court reverses petitioner's conviction on its determination that the trial judge "rested the conviction

upon the use of the expletive only." The Court reads the criminal information to charge solely the use of the expletive, and relies on the fact that the Judgment and Sentence refers specifically to the "offense" charged in the information.

The Court's reading of the language of the information seems to me much too restrictive; the information charged that petitioner "did . . . commit a contempt of court by his insolent behavior during open court and in the presence of Judge Thomas S. Crewson, to-wit: by using the language 'chicken-shit,' in the City of Tulsa Municipal Court . . . ." I am not prepared to say that this language would not put petitioner on notice that he was being charged with contempt of court by his course of conduct which began with the use of the expletive and ended with his discourteous remarks to the trial judge. In the absence of a transcript of the contempt proceedings, the Court is simply not in a position to know whether the trial judge based the contempt conviction solely on the use of the expletive, as the Court assumes, or whether the trial judge found petitioner guilty of contempt based on the course of conduct which began with the expletive and ended with the discourteous remarks.

The Oklahoma Court of Criminal Appeals apparently felt that the trial judge had considered the other remarks made by petitioner in finding him guilty of contempt.[1] Presumably that court was aware of what the

[1] There is no indication that petitioner was so unsophisticated or perhaps even so illiterate as to be unaware that his language was inappropriate for a courtroom. To the contrary, petitioner's statements in the courtroom, for example, "I think me being asked to speculate as to why someone would jump on me from behind is not within any kind of realm of prosecution," indicate that he was

information charged and what the judgment and sentence said. The "Judgment and Sentence" heavily relied upon by the Court for its reference to the "[said] offense" charged in the information is simply a preprinted standardized form in which the only thing to be filled in by the sentencing judge is the name of the defendant, the date of the judgment, the sentence imposed, and the ordinance the defendant is charged with violating.

Cole v. *Arkansas*, 333 U. S. 196 (1948), was a very different case from the instant one. There the petitioners were tried under an information charging them only with a violation of a section of a state statute making it an offense to promote an unlawful assemblage during a labor dispute. The trial court had instructed the jury on that section, and the jury had returned a conviction. On appeal to the Supreme Court of Arkansas, petitioners had contended that the section of the state statute violated the Constitution. Without passing on that question, the State Supreme Court sustained petitioners' convictions on the grounds that the information charged and the evidence showed that petitioners had violated *an entirely different section* of the same statute, which proscribed the distinct offense of using force and violence to prevent a person from engaging in a lawful vocation. This Court reversed, noting that the trial judge had, at the request of the prosecutor, read the former section to the jury and had instructed that the " 'offense . . . on trial in this case' " is the " 'promoting, encouraging or aiding of such unlawful assemblage by concert of action among the defendants as is charged in the information here.' " *Id.*, at 199.

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not a victim of his own lack of awareness of the demands of the situation.

Here we have no basis to conclude with any degree of certainty that the petitioner's contempt conviction rests solely on the use of the expletive. Both *Street* v. *New York*, 394 U. S. 576 (1969), and *Williams* v. *North Carolina*, 317 U. S. 287 (1942), were cases where all of the relevant lower court proceedings were incorporated in the record before this Court, and ambiguity was present despite that fact.[2] Here, however, there is no such ambiguity arising out of a full record; there is instead a total absence of any record of the trial which resulted in the conviction which the Court now reverses. I have no doubt that a majority of this Court would refuse to reverse petitioner's conviction in this case if it had a full record before it, and the record indicated that at the contempt hearing the trial judge had made it clear to petitioner that he was being charged with contempt based on the course of conduct beginning with his use of the expletive and ending with his discourteous remarks to the judge. Whatever the force of *Street* and *Williams* on their own facts, where ambiguity was present despite the fact that there was a full record available in this Court, I would not extend them to reach this case, where petitioner has failed to preserve a full record of what transpired below.

This Court each year reviews thousands of cases from the state courts, many of which, like this one, are characterized by less than perfect records. Reversal of state court judgments of conviction, especially in summary fashion, without argument, should be reserved for palpably clear cases of constitutional error. *Adams* v.

[2] In addition, since I conclude that petitioner herein could constitutionally be punished for the use of the expletive, cases such as *Street* and *Williams* are for me inapposite, since they dealt with situations where the Court felt that convictions may have been based on constitutionally impermissible elements in the charges or in the evidence.

United States ex rel. McCann, 317 U. S. 269 (1942); *Stroble* v. *California*, 343 U. S. 181 (1952). Since here the basis for the Court's reversal is its own highly speculative judgment as to essentially factual matters on a record which offers no more support for petitioner than it does for respondent, I dissent.

LUBIN *v.* PANISH, REGISTRAR-RECORDER OF COUNTY OF LOS ANGELES

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 71-6852. Argued October 9, 1973—Decided March 26, 1974

Petitioner, an indigent, was denied nomination papers to file as a candidate for the position of County Supervisor in California because, although otherwise qualified, he was unable to pay the filing fee required of all candidates by a California statute. He brought this class action in California Superior Court for a writ of mandate against the Secretary of State and the County Registrar-Recorder, claiming that the statute, by requiring the filing fee but providing no other way of securing access to the ballot, deprived him and others similarly situated of the equal protection guaranteed by the Fourteenth Amendment and rights of expression and association guaranteed by the First and Fourteenth Amendments. The Superior Court denied the writ of mandate; the Court of Appeal and the California Supreme Court also denied writs. *Held:* Absent reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees that he cannot pay; denying a person the right to file as a candidate solely because of an inability to pay a fixed fee, without providing any alternative means, is not reasonably necessary to the accomplishment of the State's legitimate interest of maintaining the integrity of elections. Pp. 712-719.

Reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 719. BLACKMUN, J., filed an opinion concurring in part, in which REHNQUIST, J., joined, *post*, p. 722.

Marguerite M. Buckley argued the cause for petitioner. With her on the briefs were *A. L. Wirin* and *Fred Okrand*.

Edward H. Gaylord argued the cause for respondent. With him on the brief was *John H. Larson*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider petitioner's claim that the California statute requiring payment of a filing fee of $701.60 in order to be placed on the ballot in the primary election for nomination to the position of County Supervisor, while providing no alternative means of access to the ballot, deprived him, as an indigent person unable to pay the fee, and others similarly situated, of the equal protection guaranteed by the Fourteenth Amendment and rights of expression and association guaranteed by the First Amendment.

The California Elections Code provides that forms required for nomination and election to congressional, state, and county offices are to be issued to candidates only upon prepayment of a nonrefundable filing fee. Cal. Elections Code § 6551. Generally, the required fees are fixed at a percentage of the salary for the office sought. The fee for candidates for United States Senator, Governor, and other state offices and some county offices, is 2% of the annual salary. Candidates for Representative to Congress, State Senator or Assemblyman, or for judicial office or district attorney, must pay 1%. No filing fee is required of candidates in the presidential primary, or for offices which pay either no fixed salary or not more than $600 annually. §§ 6551, 6552, and 6554.

Under the California statutes in effect at the time this suit was commenced, the required candidate filing fees ranged from $192 for State Assembly, $425 for Congress, $701.60 for Los Angeles County Board of Supervisors, $850 for United States Senator, to $982 for Governor.

The California statute provides for the counting of write-in votes subject to certain conditions. § 18600

et seq. (Supp. 1974). Write-in votes are not counted, however, unless the person desiring to be a write-in candidate files a statement to that effect with the Registrar-Recorder at least eight days prior to the election, § 18602, and pays the requisite filing fee, § 18603. The latter section provides that "[n]o name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless . . . [t]he fee required by Section 6555 is paid when the declaration of write-in candidacy is filed . . . ." Thus, the contested filing fees must be satisfied even under the write-in nomination procedures.

Petitioner commenced this class action on February 17, 1972, by petitioning the Los Angeles Superior Court for a writ of mandate against the Secretary of State and the Los Angeles County Registrar-Recorder. The suit was filed on behalf of petitioner and all those similarly situated persons who were unable to pay the filing fees and who desired to be nominated for public office. In his complaint, petitioner maintained that he was a citizen and a voter and that he had sought nomination as a candidate for membership on the Board of Supervisors of Los Angeles County.[1] Petitioner asserted that on February 15, 1972, he had appeared at the office of James S. Allison, then Registrar-Recorder of the County of Los Angeles, to apply for and secure all necessary nomination papers requisite to his proposed candidacy. Petitioner was denied the requested nomination papers orally and in writing solely because he was unable to pay the $701.60 filing fee required of all would-be candidates for the office of Board of Supervisors.

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[1] The Board of Supervisors of Los Angeles County is the governing body for Los Angeles County, California. The term is four years, the annual salary $35,080.

The Los Angeles Superior Court denied the requested writ of mandate on March 6, 1972. Petitioner alleged that he was a serious candidate, that he was indigent, and that he was unable to pay the $701.60 filing fee; no evidence was taken during the hearing. The Superior Court found the fees to be "reasonable, as a matter of law." Accordingly, the court made no attempt to determine whether the fees charged were necessary to the State's purpose, or whether the fees, in addition to deterring some frivolous candidates, also prohibited serious but indigent candidates from entering their names on the ballot. The Superior Court also rejected the argument that the State was required by *Bullock* v. *Carter,* 405 U. S. 134 (1972), to provide an alternative means of access to the ballot which did not discriminate on the basis of economic factors.

On March 9, 1972, a second petition for writ of mandate was denied by the Court of Appeal, Second District, and on March 22, 1972, after the deadline for filing nomination papers had passed, the California Supreme Court denied petitioner's third application for a writ of mandate.

Historically, since the Progressive movement of the early 20th century, there has been a steady trend toward limiting the size of the ballot in order to "concentrate the attention of the electorate on the selection of a much smaller number of officials and so afford to the voters the opportunity of exercising more discrimination in their use of the franchise." [2] This desire to limit the size of the ballot has been variously phrased as a desire to minimize voter confusion, *Thomas* v. *Mims,* 317 F. Supp. 179, 181 (SD Ala. 1970), to limit the number of runoff elections, *Spillers* v. *Slaughter,* 325 F. Supp. 550, 553 (MD

[2] H. Croly, Progressive Democracy 289 (1914).

Fla. 1971), to curb "ballot flooding," *Jenness* v. *Little,* 306 F. Supp. 925, 927 (ND Ga. 1969), appeal dismissed *sub nom. Matthews* v. *Little,* 397 U. S. 94 (1970), and to prevent the overwhelming of voting machines—the modern counterpart of ballot flooding, *Wetherington* v. *Adams,* 309 F. Supp. 318, 321 (ND Fla. 1970). A majority of States have long required the payment of some form of filing fee,[3] in part to limit the ballot and in part to have candidates pay some of the administrative costs.

In sharp contrast to this fear of an unduly lengthy ballot is an increasing pressure for broader access to the ballot. Thus, while progressive thought in the first half of the century was concerned with restricting the ballot to achieve voting rationality, recent decades brought an enlarged demand for an expansion of political opportunity. The Twenty-fifth Amendment, the Twenty-sixth Amendment, and the Voting Rights Act of 1965, 79 Stat. 437, 42 U. S. C. § 1973 *et seq.,* reflect this shift in emphasis. There has also been a gradual enlargement of the Fourteenth Amendment's equal protection provision in the area of voting rights:

> "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, *e. g., Reynolds* v. *Sims,* 377 U. S. 533; *Kramer* v. *Union School District,* 395 U. S. 621; *Dunn* v. *Blumstein,* 405 U. S. 330, 336." *San Antonio School District* v.

[3] See Comment, The Constitutionality of Qualifying Fees for Political Candidates, 120 U. Pa. L. Rev. 109 (1971), for a detailed description of each State's filing-fee requirements.

Rodriguez, 411 U. S. 1, 59 n. 2 (1973) (STEWART, J., concurring).

This principle flows naturally from our recognition that

> "[l]egislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964) (Warren, C. J.).

The present case draws these two means of achieving an effective, representative political system into apparent conflict and presents the question of how to accommodate the desire for increased ballot access with the imperative of protecting the integrity of the electoral system from the recognized dangers of ballots listing so many candidates as to undermine the process of giving expression to the will of the majority. The petitioner stated on oath that he is without assets or income and cannot pay the $701.60 filing fee although he is otherwise legally eligible to be a candidate on the primary ballot. Since his affidavit of indigency states that he has no resources and earned no income whatever in 1972, it would appear that he would make the same claim whether the filing fee had been fixed at $1, $100, or $700. The State accepts this as true but defends the statutory fee as necessary to keep the ballot from being overwhelmed with frivolous or otherwise nonserious candidates, arguing that as to indigents the filing fee is not intended as a test of his pocketbook but the extent of his political support and hence the seriousness of his candidacy.

In *Bullock* v. *Carter*, 405 U. S. 134 (1972),[4] we recognized that the State's interest in keeping its ballots within manageable, understandable limits is of the highest order. *Id.*, at 144–145. The role of the primary election process in California is underscored by its importance as a component of the total electoral process and its special function to assure that fragmentation of voter choice is minimized. That function is served, not frustrated, by a procedure that tends to regulate the filing of frivolous candidates. A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. That no device can be conjured to eliminate every frivolous candidacy does not undermine the State's effort to eliminate as many such as possible.

That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely

[4] *Bullock*, of course, does not completely resolve the present attack upon the California election statutes because it involved filing fees that were so patently exclusionary as to violate traditional equal protection concepts. Cf. *Rosario* v. *Rockefeller*, 410 U. S. 752, 760 (1973); *James* v. *Strange*, 407 U. S. 128 (1972); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966). Under attack in *Bullock* was a Texas statute that required candidates to pay a flat fee of $50 plus their pro rata share of the costs of the election in order to get on the primary ballot. Tex. Election Code, Art. 13.07a (Supp. 1974). The assessment of costs involved sums as high as $8,900.

to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success.

This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.

> "[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968).

This must also mean that the right to vote is "heavily burdened" if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot. It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars.

In *Bullock, supra,* we expressly rejected the validity of filing fees as the sole means of determining a candidate's "seriousness":

> "To say that the filing fee requirement tends to limit

> the ballot to the more serious candidates is not enough. There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, but the candidates in this case affirmatively alleged that they were *unable*, not simply *unwilling*, to pay the assessed fees, and there was no contrary evidence. It is uncontested that the filing fees exclude legitimate as well as frivolous candidates. . . . If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; other means to protect those valid interests are available." 405 U. S., at 145–146. (Emphasis in original.) (Footnotes omitted.)

Filing fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office. A large filing fee may serve the legitimate function of keeping ballots manageable but, standing alone, it is not a certain test of whether the candidacy is serious or spurious. A wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check. Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public. We have also noted that prohibitive filing fees, such as those in *Bullock*, can effectively exclude serious candidates. Conversely, if the filing fee is more moderate, as here, impecunious but serious candidates may be prevented from running. Even in this day of high-budget political campaigns some candidates have demonstrated that direct contact with thousands of voters by "walking tours" is a route to success. Whatever may be the political mood at any given time, our

tradition has been one of hospitality toward all candidates without regard to their economic status.

The absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants. As we have noted, the payment of a fee is an absolute, not an alternative, condition, and failure to meet it is a disqualification from running for office. Thus, California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.

In so holding, we note that there are obvious and well-known means of testing the "seriousness" of a candidacy which do not measure the probability of attracting significant voter support solely by the neutral fact of payment of a filing fee. States may, for example, impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election. See *American Party of Texas* v. *White*, *post*, p. 767. Similarly, a candidate who establishes that he cannot pay the filing fee required for a place on the primary ballot may be required to demonstrate the "seriousness" of his candidacy by persuading

a substantial number of voters to sign a petition in his behalf.[5] The point, of course, is that ballot access must be genuinely open to all, subject to reasonable requirements. *Jenness* v. *Fortson,* 403 U. S. 431, 439 (1971). California's present system has not met this standard.

Reversed and remanded for further consideration not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion I wish to add a few words, since in my view this case is clearly controlled by prior decisions applying the Equal Protection Clause to wealth discriminations. Since classifications based on wealth are "traditionally disfavored," *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663, 668 (1966), the State's inability to show a compelling interest in conditioning the right to run for office on payment of fees cannot stand. *Bullock* v. *Carter,* 405 U. S. 134 (1972).

The Court first began looking closely at discrimination against the poor in the criminal area. In *Griffin*

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[5] It is suggested that a write-in procedure, under § 18600 *et seq.,* without a filing fee would be an adequate alternative to California's present filing-fee requirement. The realities of the electoral process, however, strongly suggest that "access" via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. It would allow an affluent candidate to put his name before the voters on the ballot by paying a filing fee while the indigent, relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot. That disparity would, itself, give rise to constitutional questions and, although we need not decide the issue, the intimation that a write-in provision without the filing fee required by § 18600 *et seq.* would constitute "an acceptable alternative" appears dubious at best.

v. *Illinois*, 351 U. S. 12 (1956), we found that *de facto* denial of appeal rights by an Illinois statute requiring purchase of a transcript denied equal protection to indigent defendants since there "can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, at 19. In *Douglas* v. *California*, 372 U. S. 353 (1963), we found that the State had drawn "an unconstitutional line . . . between rich and poor" when it allowed an appellate court to decide an indigent's case on the merits although no counsel had been appointed to argue his case before the appellate court. Just recently we found that the State could not extend the prison term of an indigent for his failure to pay an assessed fine, since the length of confinement could not under the Equal Protection Clause be made to turn on one's ability to pay. *Williams* v. *Illinois*, 399 U. S. 235 (1970); see *Tate* v. *Short*, 401 U. S. 395 (1971). But criminal procedure has not defined the boundaries within which wealth discriminations have been struck down. In *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), the majority found that the filing fee which denied the poor access to the courts for divorce was a denial of due process; MR. JUSTICE BRENNAN and I in concurrence preferred to rest the result on equal protection. And it was the Equal Protection Clause the majority relied on in *Lindsey* v. *Normet*, 405 U. S. 56, 79 (1972), in finding that Oregon's double-bond requirement for appealing forcible entry and detainer actions discriminated against the poor: "For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be."

Indeed, the Court has scrutinized wealth discrimination in a wide variety of areas. In *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969), we found that deterring indigents from migrating into the State was not a constitu-

tionally permissible state objective. Closer to the case before us here was *Turner* v. *Fouche*, 396 U. S. 346, 362–364 (1970), in which the Court found that Georgia could not constitutionally require ownership of land as a qualification for membership on a county board of education. See *Kramer* v. *Union Free School Dist.*, 395 U. S. 621 (1969); *Cipriano* v. *Houma*, 395 U. S. 701 (1969). In *Harper* v. *Virginia Bd. of Elections, supra,* we found a state poll tax violative of equal protection because of the burden it placed on the poor's exercise of the franchise. And in *Bullock* v. *Carter, supra*, we invalidated a Texas filing fee system virtually indistinguishable from that presented here.

What we do today thus involves no new principle, nor any novel application. "[A] man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States." *Edwards* v. *California*, 314 U. S. 160, 184 (1941) (Jackson, J., concurring). Voting is clearly a fundamental right.* *Harper* v. *Virginia Bd. of Elections, supra*, at 667; *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964). But the

*"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964).

Wesberry involved a federal election. Article I, § 2, of the Federal Constitution declares that Members of the House should be "chosen every second Year by the People of the several States"; and the Seventeenth Amendment says that Senators shall be "elected by the people." But the right to vote in state elections is one of the rights historically "retained by the people" by virtue of the Ninth Amendment as well as included in the penumbra of First Amendment rights. As MR. JUSTICE BRENNAN stated in *Storer* v. *Brown, post,* at 756, "The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment." (Dissenting opinion.)

right to vote would be empty if the State could arbitrarily deny the right to stand for election. California does not satisfy the Equal Protection Clause when it allows the poor to vote but effectively prevents them from voting for one of their own economic class. Such an election would be a sham, and we have held that the State must show a compelling interest before it can keep political minorities off the ballot. *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968). The poor may be treated no differently.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in part.

For me, the difficulty with the California election system is the absence of a realistic alternative access to the ballot for the candidate whose indigency renders it impossible for him to pay the prescribed filing fee.

In addition to a proper petitioning process suggested by the Court in its opinion, *ante*, at 718, I would regard a write-in procedure, free of fee, as an acceptable alternative. Prior to 1968, California allowed this, and write-in votes were counted, although no prior fee had been paid. But the prior fee requirement for the write-in candidate was incorporated into the State's Elections Code in that year, Laws 1968, c. 79, § 3, and is now § 18603 (b) of the Code. It is that addition, by amendment, that serves to deny the petitioner the equal protection guaranteed to him by the Fourteenth Amendment. Section 18603 (b) appears to be severable. See *Frost* v. *Corporation Comm'n*, 278 U. S. 515, 525–526 (1929); *Truax* v. *Corrigan*, 257 U. S. 312, 341–342 (1921). The Code itself provides for severability. Cal. Elections Code § 48. That, however, is an issue for the California courts to decide.

I would hold that the California election statutes are unconstitutional insofar as they presently deny access to the ballot. If § 18603 (b) were to be stricken, the Code, as before, would permit write-in access with no prior fee. The presence of that alternative, although not perfect, surely provides the indigent would-be candidate with as much ease of access to the ballot as the alternative of obtaining a large number of petition signatures in a relatively short time. See *Storer* v. *Brown*, *post*, at 738–746. The Court seemingly would reject a write-in alternative while accepting many petition alternatives. In my view, a write-in procedure, such as California's before 1968, satisfies the demands of the Equal Protection Clause as well as most petitioning procedures. I, therefore, join the Court in reversing the order of the Supreme Court of California denying petitioner's petition for writ of mandate and in remanding the case for further proceedings.

STORER ET AL. *v.* BROWN, SECRETARY OF STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 72–812. Argued November 5, 1973—Decided March 26, 1974*

Section 6830 (d) (Supp. 1974) of the California Elections Code forbids ballot position to an independent candidate for elective public office if he had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election; § 6831 (1961) requires an independent candidate's nominating papers to be signed by voters not less in number than 5% nor more than 6% of the entire vote cast in the preceding general election; § 6833 (Supp. 1974) requires all such signatures to be obtained during a 24-day period following the primary and ending 60 days prior to the general election; and § 6830 (c) (Supp. 1974) requires that none of such signatures be those of persons who voted at the primary. Appellants Storer and Frommhagen were disqualified under § 6830 (d) (Supp. 1974) for ballot status as independent candidates for Congress in the 1972 California elections because they were affiliated with a qualified party no more than six months prior to the primary. Appellants Hall and Tyner were disqualified for ballot status as independent candidates for President and Vice President in the same election for failure to meet petition requirements. Appellants brought actions challenging the constitutionality of the above provisions, claiming that their combined effect infringed on rights guaranteed by the First and Fourteenth Amendments. A three-judge District Court dismissed the complaints, concluding that the statutes served a sufficiently important state interest to sustain their constitutionality. *Held:*

1. Section 6830 (d) (Supp. 1974) is not unconstitutional, and appellants Storer and Frommhagen (who were affiliated with a qualified party no more than six months before the primary) were properly barred from the ballot as a result of its application. Pp. 728–737.

(a) The provision reflects a general state policy aimed at maintaining the integrity of the various routes to the ballot, and

*Together with No. 72–6050, *Frommhagen* v. *Brown, Secretary of State of California, et al.*, also on appeal from the same court.

involves no discrimination against independents. Though an independent candidate must be clear of party affiliations for a year before the primary, a party candidate under § 6490 (Supp. 1974) of the Code must not have been registered with another party for a year before he files his declaration, which must be done not less than 83 days and not more than 113 days prior to the primary. Pp. 733–734.

(b) The provision protects the direct primary process, which is an integral part of the entire election process, by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot; works against independent candidacies prompted by short-range political goals, pique, or a personal quarrel; is a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party; and thus furthers the State's compelling interest in the stability of its political system, outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status. Pp. 734–735.

2. Further proceedings should be had in the District Court to permit additional findings concerning the extent of the burden imposed on independent candidates for President and Vice President under California law, particularly with respect to whether § 6831 (1961) and § 6833 (Supp. 1974) place an unconstitutional restriction on access by appellants Hall and Tyner to the ballot. Pp. 738–746.

(a) It should be determined whether the available pool of possible signers of the nominating papers is so diminished by the disqualification of those who voted in the primary that the 5% provision, which as applied here apparently imposes a 325,000-signature requirement, to be satisfied in 24 days, is unduly onerous. Pp. 739–740.

(b) While the District Court apparently took the view that California law disqualified anyone who voted in the primary from signing an independent's petition, whether or not the vote was confined to nonpartisan matters, it would be difficult on the record before this Court to ascertain any rational ground, let alone a compelling interest, for disqualifying nonpartisan primary voters. Pp. 741–742.

(c) Once the District Court ascertains the number of signatures required in the 24-day period, along with the total pool from which they may be drawn, the court then, in determining whether

in the context of California politics a reasonably diligent independent candidate could be expected to satisfy the signature requirements or will only rarely succeed in securing ballot placement, should consider not only past experience, but also the relationship between the showing of support through a petition requirement and the percentage of the vote the State can reasonably expect of a candidate who achieves ballot status in the general election. Pp. 742–746.

Affirmed in part, vacated and remanded in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 755.

Paul N. Halvonik and *Joseph Remcho* argued the cause for appellants in both cases. With them on the brief for appellants in No. 72–812 was *Charles C. Marson*. Appellant *pro se* filed a brief in No. 72–6050.

Clayton P. Roche, Deputy Attorney General of California, argued the cause for appellee Brown in both cases. With him on the brief were *Evelle J. Younger*, Attorney General, and *Iver E. Skjeie*, Assistant Attorney General.†

MR. JUSTICE WHITE delivered the opinion of the Court.

The California Elections Code forbids ballot position to an independent candidate for elective public office if he voted in the immediately preceding primary, § 6830 (c) (Supp. 1974),[1] or if he had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election. § 6830 (d) (Supp. 1974). The independent candidate must also file nomination papers signed by voters not less

†*Rolland R. O'Hare* filed a brief for the Committee for Democratic Election Laws as *amicus curiae* in No. 72–812.

[1] The relevant provisions of the California Elections Code are printed in the appendix to this opinion.

in number than 5% nor more than 6% of the entire vote cast in the preceding general election in the area for which the candidate seeks to run. § 6831 (1961). All of these signatures must be obtained during a 24-day period following the primary and ending 60 days prior to the general election, § 6833 (Supp. 1974), and none of the signatures may be gathered from persons who vote at the primary election. § 6830 (c) (Supp. 1974). The constitutionality of these provisions is challenged here as infringing on rights guaranteed by the First and Fourteenth Amendments and as adding qualifications for the office of United States Congressman, contrary to Art. I, § 2, cl. 2, of the Constitution.

Prior to the 1972 elections, appellants Storer, Frommhagen, Hall, and Tyner, along with certain of their supporters, filed their actions [2] to have the above sections of the Elections Code declared unconstitutional and their enforcement enjoined. Storer and Frommhagen each sought ballot status as an independent candidate for Congressman from his district.[3] Both complained about the party disaffiliation requirement of § 6830 (d) (Supp. 1974) and asserted that the combined effects of the provisions were unconstitutional burdens on their First and Fourteenth Amendment rights. Hall and Tyner claimed the right to ballot position as independent candidates for President and Vice President of the United States. They

[2] Storer's action, No. 72–812, was filed first. Frommhagen was allowed to intervene. Hall and Tyner later filed suit. In its opinion the District Court noted that "[b]y appropriate orders and stipulations, although the cases were never consolidated, the parties to *Hall* will be bound by the rulings made in *Storer* which are common to both cases and any separate issues in *Hall* stand submitted without further briefing or oral argument. The view taken by the Court herein is such that there are no separate issues in *Hall* and the rulings expressed are dispositive of both cases."

[3] Storer sought to be a candidate from the Sixth Congressional District, Frommhagen from the Twelfth.

were members of the Communist Party but that party had not qualified for ballot position in California. They, too, complained of the combined effect of the indicated sections of the Elections Code on their ability to achieve ballot position.

A three-judge District Court concluded that the statutes served a sufficiently important state interest to sustain their constitutionality and dismissed the complaints. Two separate appeals were taken from the judgment. We noted probable jurisdiction and consolidated the cases for oral argument. 410 U. S. 965 (1973).

I

We affirm the judgment of the District Court insofar as it refused relief to Storer and Frommhagen with respect to the 1972 general election. Both men were registered Democrats until early in 1972, Storer until January and Frommhagen until March of that year. This affiliation with a qualified political party within a year prior to the 1972 primary disqualified both men under § 6830 (d) (Supp. 1974); and in our view the State of California was not prohibited by the United States Constitution from enforcing that provision against these men.

In *Williams* v. *Rhodes*, 393 U. S. 23 (1968), the Court held that although the citizens of a State are free to associate with one of the two major political parties, to participate in the nomination of their chosen party's candidates for public office and then to cast their ballots in the general election, the State must also provide feasible means for other political parties and other candidates to appear on the general election ballot. The Ohio law under examination in that case made no provision for independent candidates and the requirements for any but the two major parties qualifying for the ballot were so burdensome that it was "virtually impossible" for other parties, new or old, to achieve ballot position for their can-

didates. *Id.*, at 25. Because these restrictions, which were challenged under the Equal Protection Clause, severely burdened the right to associate for political purposes and the right to vote effectively, the Court, borrowing from other cases, ruled that the discriminations against new parties and their candidates had to be justified by compelling state interests. The Court recognized the substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community and in providing the electorate with an understandable ballot and inferred that "reasonable requirements for ballot position," *id.*, at 32, would be acceptable. But these important interests were deemed insufficient to warrant burdens so severe as to confer an effective political monopoly on the two major parties. The First and Fourteenth Amendments, including the Equal Protection Clause of the latter, required as much.

In challenging § 6830 (d) (Supp. 1974), appellants rely on *Williams* v. *Rhodes* and assert that under that case and subsequent cases dealing with exclusionary voting and candidate qualifications, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330 (1972); *Bullock* v. *Carter,* 405 U. S. 134 (1972); *Kramer* v. *Union Free School District,* 395 U. S. 621 (1969), substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest. These cases, however, do not necessarily condemn § 6830 (d) (Supp. 1974). It has never been suggested that the *Williams-Kramer-Dunn* rule automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the

qualifications of voters who will elect members of Congress. Art. I, § 2, cl. 1. Also Art. I, § 4, cl. 1, authorizes the States to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," *Dunn* v. *Blumstein, supra,* at 348, very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams* v. *Rhodes, supra,* at 30; *Dunn* v. *Blumstein, supra,* at 335. What the result of this process will be in any specific case may be very difficult to predict with great assurance.

The judgment in *Dunn* v. *Blumstein* invalidated the Tennessee one-year residence requirement for voting but agreed that the State's interest was obviously sufficient

to limit voting to residents, to require registration for voting, and to close the registration books at some point prior to the election, a deadline which every resident must meet if he is to cast his vote at the polls. Subsequently, three-judge district courts differed over the validity of a requirement that voters be registered for 50 days prior to election. This Court, although divided, sustained the provision. *Burns* v. *Fortson*, 410 U. S. 686 (1973); *Marston* v. *Lewis*, 410 U. S. 679 (1973).

Rosario v. *Rockefeller*, 410 U. S. 752 (1973), is more relevant to the problem before us. That case dealt with a provision that to vote in a party primary the voter must have registered as a party member 30 days prior to the previous general election, a date eight months prior to the presidential primary and 11 months prior to the nonpresidential primary. Those failing to meet this deadline, with some exceptions, were barred from voting at either primary. We sustained the provision as "in no sense invidious or arbitrary," because it was "tied to [the] particularized legitimate purpose," *id.*, at 762, of preventing interparty raiding, a matter which bore on "the integrity of the electoral process." *Id.*, at 761.

Later the Court struck down similar Illinois provisions aimed at the same evil, where the deadline for changing party registration was 23 months prior to the primary date. *Kusper* v. *Pontikes*, 414 U. S. 51 (1973). One consequence was that a voter wishing to change parties could not vote in any primary that occurred during the waiting period. The Court did not retreat from *Rosario* or question the recognition in that case of the States' strong interest in maintaining the integrity of the political process by preventing interparty raiding. Although the 11-month requirement imposed in New York had been accepted as necessary for an effective remedy, the Court was unconvinced that the 23-month period estab-

lished in Illinois was an essential instrument to counter the evil at which it was aimed.

Other variables must be considered where qualifications for candidates rather than for voters are at issue. In *Jenness* v. *Fortson,* 403 U. S. 431 (1971), we upheld a requirement that independent candidates must demonstrate substantial support in the community by securing supporting signatures amounting to 5% of the total registered voters in the last election for filling the office sought by the candidate. The Court said:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.,* at 442.

Subsequently, in *Bullock* v. *Carter,* 405 U. S., at 145, a unanimous Court said:

> "The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. *Jenness* v. *Fortson,* 403 U. S., at 442; *Williams* v. *Rhodes,* 393 U. S., at 32. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections. Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded bal-

> lots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Jenness* v. *Fortson*, 403 U. S., at 442."

Against this pattern of decisions we have no hesitation in sustaining § 6830 (d) (Supp. 1974). In California, the independent candidacy route to obtaining ballot position is but a part of the candidate-nominating process, an alternative to being nominated in one of the direct party primaries. The independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Otherwise, the qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates. Section 6401 (Supp. 1974) imposes a flat disqualification upon any candidate seeking to run in a party primary if he has been "registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration." Moreover, §§ 6402 and 6611 provide that a candidate who has been defeated in a party primary may not be nominated as an independent or be a candidate of any other party; and no person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election.

The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot. It involves no discrimination against independents. Indeed, the independent candidate must be clear of political party affiliations for a year before the primary; the party candidate must not have been registered with another party for a year before he files

his declaration, which must be done not less than 83 and not more than 113 days prior to the primary. § 6490 (Supp. 1974).

In *Rosario* v. *Rockefeller,* there was an 11-month waiting period for voters who wanted to change parties. Here, a person terminating his affiliation with a political party must wait at least 12 months before he can become a candidate in another party's primary or an independent candidate for public office. The State's interests recognized in *Rosario* are very similar to those that undergird the California waiting period; and the extent of the restriction is not significantly different. It is true that a California candidate who desires to run for office as an independent must anticipate his candidacy substantially in advance of his election campaign, but the required foresight is little more than the possible 11 months examined in *Rosario,* and its direct impact is on the candidate, and not voters. In any event, neither Storer nor Frommhagen is in position to complain that the waiting period is one year, for each of them was affiliated with a qualified party no more than six months prior to the primary. As applied to them, § 6830 (d) (Supp. 1974) is valid.

After long experience, California came to the direct party primary as a desirable way of nominating candidates for public office. It has also carefully determined which public offices will be subject to partisan primaries and those that call for nonpartisan elections.[4] Moreover, after long experience with permitting candidates to run in the primaries of more than one party, California forbade the cross-filing practice in 1959.[5] A candidate in

[4] The California Elections Code § 41 provides that judicial, school, county, and municipal offices are nonpartisan offices for which no party may nominate a candidate.

[5] See Gaylord, History of the California Election Laws 59, contained in West's Ann. Elec. Code (1961), preceding §§ 1–11499.

one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have been associated with another political party for a year prior to the primary. See §§ 6401, 6611. The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process,[6] the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

Section 6830 (d) (Supp. 1974) carries very similar credentials. It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.

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[6] See *In re McGee*, 36 Cal. 2d 592, 226 P. 2d 1 (1951).

A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison). It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status. Nor do we have reason for concluding that the device California chose, § 6830 (d) (Supp. 1974), was not an essential part of its overall mechanism to achieve its acceptable goals. As we indicated in *Rosario,* the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot.

We conclude that § 6830 (d) (Supp. 1974) is not unconstitutional, and Storer and Frommhagen were properly barred from the ballot as a result of its application.[7] Cf. *Lippitt* v. *Cipollone,* 404 U. S. 1032 (1972). Having reached this result, there is no need to examine the constitutionality of the other provisions of the Elections Code as they operate singly or in combination as applied to these candidates. Even if these statutes were wholly or partly unconstitutional, Storer and Frommhagen were still properly barred from having their names placed on

[7] Moreover, we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law, see §§ 18600–18603 (Supp. 1974).

the 1972 ballot. Although *Williams* v. *Rhodes*, 393 U. S., at 34, spoke in terms of assessing the "totality" of the election laws as they affected constitutional rights, if a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates. The concept of "totality" is applicable only in the sense that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights. The disaffiliation requirement does not change its character when combined with other provisions of the electoral code. It is an absolute bar to candidacy, and a valid one. The District Court need not have heard a challenge to these other provisions of the California Elections Code by one who did not satisfy the age requirement for becoming a member of Congress, and there was no more reason to consider them at the request of Storer and Frommhagen or at the request of voters who desire to support unqualified candidates.[8]

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[8] The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." *Rosario* v. *Rockefeller*, 410 U. S. 752, 756 n. 5 (1973); *Dunn* v. *Blumstein*, 405 U. S. 330, 333 n. 2 (1972); *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

II

We come to different conclusions with respect to Hall and Tyner.[9] As to these two men we vacate the judgment of the District Court and remand the case for further proceedings to determine whether the California election laws place an unconstitutional burden on their access to the ballot.

We start with the proposition that the requirements for an independent's attaining a place on the general election ballot can be unconstitutionally severe, *Williams* v. *Rhodes, supra.* We must, therefore, inquire as to the nature, extent, and likely impact of the California requirements.

Beyond the one-year party disaffiliation condition and the rule against voting in the primary, both of which Hall apparently satisfied, it was necessary for an independent candidate to file a petition signed by voters not less in number than 5% of the total votes cast in California at the last general election. This percentage, as such, does not appear to be excessive, see *Jenness* v. *Fortson, supra,* but to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts which do not appear from the evidentiary record in this case.

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[9] In California, presidential electors must meet candidacy requirements and file their nomination papers with the required signatures. §§ 6803, 6830. The State claims, therefore, that the electors, not Hall and Tyner, are the only persons with standing to raise the validity of the signature requirements. But it is Hall's and Tyner's names that go on the California ballot for consideration of the voters. § 6804. Without the necessary signatures this will not occur. It is apparent, contrary to the State's suggestion, that Hall and Tyner have ample standing to challenge the signature requirement.

Hereafter, in the text and notes, reference to Hall should be understood as referring also to Tyner.

It is necessary in the first instance to know the "entire vote" in the last general election. Appellees suggest that 5% of that figure, whatever that is, is 325,000. Assuming this to be the correct total signature requirement, we also know that it must be satisfied within a period of 24 days between the primary and the general election. But we do not know the number of qualified voters from which the requirement must be satisfied within this period of time. California law disqualifies from signing the independent's petition all registered voters who voted in the primary. In theory, it could be that voting in the primary was so close to 100% of those registered, and new registrations since closing the books before primary day were so low, that eligible signers of an unaffiliated candidate's petition would number less than the total signatures required. This is unlikely, for it is usual that a substantial percentage of those eligible do not vote in the primary, and there were undoubtedly millions of voters qualified to vote in the 1972 primary. But it is not at all unlikely that the available pool of possible signers, after eliminating the total primary vote, will be substantially smaller than the total vote in the last general election and that it will require substantially more than 5% of the eligible pool to produce the necessary 325,000 signatures. This would be in excess, percentagewise, of anything the Court has approved to date as a precondition to an independent's securing a place on the ballot and in excess of the 5% which we said in *Jenness* was higher than the requirement imposed by most state election codes.[10]

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[10] See also *Auerbach* v. *Mandel*, 409 U. S. 808 (1972) (3%); *Wood* v. *Putterman*, 316 F. Supp. 646 (Md. 1970) (three-judge court), aff'd mem., 400 U. S. 859 (1970) (3%); and *Beller* v. *Kirk*, 328 F. Supp. 485 (SD Fla. 1970) (three-judge court), aff'd mem. *sub nom. Beller* v. *Askew*, 403 U. S. 925 (1971) (3%). We note that

We are quite sure, therefore, that further proceedings should be had in the District Court to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President under California law. Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President. But it is a substantial requirement; and if the additional likelihood is, as it seems to us to be, that the total signatures required will amount to a substantially higher percentage of the available pool than the 5% stipulated in the statute, the constitutional claim asserted by Hall is not frivolous. Before the claim is finally dismissed, it should be determined whether the available pool is so diminished in size by the disqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President.

Because further proceedings are required, we must resolve certain issues that are in dispute in order that the ground rules for the additional factfinding in the District Court will more clearly appear. First, we have no doubt about the validity of disqualifying from signing an independent candidate's petition all those registered voters who voted a partisan ballot in the primary, although they did not vote for the office sought by the

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in *Socialist Labor Party* v. *Rhodes*, 318 F. Supp. 1262 (SD Ohio 1970) (three-judge court), the District Court struck down a 7% petition requirement. That issue became moot on appeal, *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 585 (1972).

independent. We have considered this matter at greater length in *American Party of Texas* v. *White*, see *post*, at 785–786, and we merely repeat here that a State may confine each voter to one vote in one primary election, and that to maintain the integrity of the nominating process the State is warranted in limiting the voter to participating in but one of the two alternative procedures, the partisan or the nonpartisan, for nominating candidates for the general election ballot.

Second, the District Court apparently had little doubt that the California law disqualified anyone voting in the primary election, whether or not he confined his vote to nonpartisan offices and propositions.[11] The State of California asserts this to be an erroneous interpretation of California law and claims that the District Court should have abstained to permit the California courts to address the question. In any event, the State does not attempt to justify disqualifying as signers of an independent's petition those who voted only a nonpartisan ballot at the primary, such as independent voters who themselves were disqualified from voting a partisan ballot. See § 311 (Supp. 1974). With what we have before us, it would be difficult to ascertain any rational ground, let alone a compelling interest, for disqualifying nonpartisan voters at the primary from signing an independent candidate's petition, and we think the District Court should reconsider the matter in the light of tentative views expressed here. Under the controlling cases, the District Court may, if it is so advised, abstain and permit the California courts to construe the California statute. On the other hand, it may be that adding to

[11] Two ballots are authorized in California primaries, the one for partisan office and the other for nonpartisan offices and propositions. See §§ 10014, 10232, 10318. A voter may take only the nonpartisan ballot and refrain from voting on partisan candidates.

the qualified pool of signers all those nonpartisan voters at the primary may make so little difference in the ultimate assessment of the overall burden of the signature requirement that the status of the nonpartisan voter is in fact an insignificant consideration not meriting abstention.[12]

Third, once the number of signatures required in the 24-day period is ascertained, along with the total pool from which they may be drawn, there will arise the inevitable question for judgment: in the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not. We note here that the State mentions only one instance of an independent candidate's qualifying for any office under § 6430, but disclaims having made any comprehensive survey of the official records that would perhaps reveal the truth of the matter. One of the difficulties will be that the number of signatures required will vary with the total vote in the last election;

[12] From the official published voting statistics published by the California Secretary of State, it would appear that the total vote in the 1972 primaries, seemingly the total number of persons voting, was 6,460,220, while the total vote for partisan presidential candidates was 5,880,845. Thus all but approximately 579,000 voted for a partisan candidate in the presidential primary and it is likely that many of the 579,000 not voting for President cast a partisan ballot for other candidates. But assuming that they did not, the maximum addition to the pool available to Hall would be 579,000, probably a relatively small difference in terms of the total number of eligible signers. See Secretary of State, Statement of Vote, State of California, Consolidated Primary Election, June 6, 1972, pp. 3, 4–23.

the total disqualifying vote at the primary election and hence the size of the eligible pool of possible signers will also vary from election to election. Also to be considered is the relationship between the showing of support through a petition requirement and the percentage of the vote the State can reasonably expect of a candidate who achieves ballot status in the general election.

As a preliminary matter, it would appear that the State, having disqualified defeated candidates and recent defectors, has in large part achieved its major purpose of providing and protecting an effective direct primary system and must justify its independent signature requirements chiefly by its interest in having candidates demonstrate substantial support in the community so that the ballot, in turn, may be protected from frivolous candidacies and kept within limits understandable to the voter. If the required signatures approach 10% of the eligible pool of voters, is it necessary to serve the State's compelling interest in a manageable ballot to require that the task of signature gathering be crowded into 24 days? [13] Of course, the petition period must end at a reasonable time before election day to permit nomination papers to be verified. Neither must California abandon its policy of confining each voter to a single nominating act—either voting in the partisan primary or a signature on an independent petition. But the question remains whether signature gathering must

[13] Appellees argue only that the independent candidate's canvassing for signatures should await the announcement of the primary winners and the promulgation of party platforms so that the voters eligible to sign, *i. e.*, those not voting in the primary, will have a meaningful choice between the primary nominations and the independents. This does not appear to be a matter particularly relevant to signing petitions for ballot position, for the meaningful choice referred to by appellees will be finally presented at the general election.

await conclusion of the primary. It would not appear untenable to permit solicitation of signatures to begin before primary day and finish afterwards. Those signing before the primary could either be definitely disqualified from a partisan vote in the primary election or have the privilege of canceling their petition signatures by the act of casting a ballot in the primary election. And if these alternatives are unacceptable, there would remain the question whether it is essential to demonstrate community support to gather signatures of substantially more than 5% of the group from which the independent is permitted to solicit support.[14]

Appellees insist, however, that the signature requirements for independent candidates are of no consequence because California has provided a valid way for new political parties to qualify for ballot position, an alternative that Hall could have pursued, but did not. Under § 6430, new political parties can be recognized and qualify their candidate for ballot position if 135 days before a primary election it appears that voters equal in number to at least 1% of the entire vote of the State at the last preceding gubernatorial election have declared to the

[14] It may help to put this case in proper context to hypothesize the scope of Hall's petition and signature burden under the California law by employing the election statistics available from official sources in California. Assuming that the "entire vote" in the last general election was the total number of persons voting in the 1970 election, 6,633,400, 5% of that figure, or the total number of signatures required, is 331,670. See Secretary of State, Statement of Vote, General Election, November 7, 1972, p. 6. The total registration for the 1972 primary was 9,105,287. See 1972 Primary Vote, p. 3. Adding to this figure an estimate of the increase in registration since the primary date and subtracting the minimum partisan vote at the primary election, the available pool of possible signers, by this calculation, would be 4,072,279, see Secretary of State, Report of Registration, September 1972, p. 8, of which the required 331,670 signatures was 8.1%.

county clerks their intention to affiliate with the new party, or if, by the same time, the new party files a petition with signatures equal in number to 10% of the last gubernatorial vote.[15] It is argued that the 1% registration requirement is feasible, has recently been resorted to successfully by two new political parties now qualified for the California ballot, and goes as far as California constitutionally must go in providing an alternative to the direct party primary of the major parties.

It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. Cf. *American Party of Texas* v. *White, post,* p. 767. But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status under California law, such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man,

[15] The 1% registration requirement contemplates independent voters registering as affiliated with the party. The 10%-signature requirement, on the other hand, need not involve signers changing their registration.

surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not.

In *Williams* v. *Rhodes*, the opportunity for political activity within either of two major political parties was seemingly available to all. But this Court held that to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. No discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties. Similarly, here, we perceive no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the State is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support.[16]

Accordingly, we vacate the judgment in No. 72–812 insofar as it refused relief to Hall and Tyner and remand the case in this respect to the District Court for further proceedings consistent with this opinion. In all other respects, the judgment in No. 72–812 and No. 72–6050 is affirmed.

So ordered.

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[16] Appellants also contend that § 6830 (d) (Supp. 1974) purports to establish an additional qualification for office of Representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. The argument is wholly without merit. Storer and Frommhagen would not have been disqualified had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election. The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.

APPENDIX TO OPINION OF THE COURT

California Elections Code

§ 41. "Nonpartisan office"

"Nonpartisan office" means an office for which no party may nominate a candidate. Judicial, school, county, and municipal offices are nonpartisan offices.

§ 311 [Supp. 1974]. Declaration of political affiliation; voting at primary elections

At the time of registering and of transferring registration, each elector may declare the name of the political party with which he intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.

If the elector declines to state his political affiliation, he shall be registered as "Nonpartisan" or "Declines to state," as he chooses. If the elector declines to state his political affiliation, he shall be informed that no person shall be entitled to vote the ballot of any political party at any primary election unless he has stated the name of the party with which he intends to affiliate at the time of registration. He shall not be permitted to vote the ballot of any party or for delegates to the convention of any party other than the party designated in his registration.

§ 2500. General election

There shall be held throughout the State, on the first Tuesday after the first Monday of November in every even-numbered year, an election, to be known as the general election.

§ 2501. Direct primary

For the nomination of all candidates to be voted for at the general election, a direct primary shall be held at

the legally designated polling places in each precinct on the first Tuesday after the first Monday in the immediately preceding June.

§ 2502. Primary elections

Any primary election other than the direct primary or presidential primary shall be held on Tuesday, three weeks next preceding the election for which the primary election is held.

§ 6401 [Supp. 1974]. Party affiliation

No declaration of candidacy for a partisan office or for membership on a county central committee shall be filed, either by the candidate himself or by sponsors on his behalf, (1) unless at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, or for as long as he has been eligible to register to vote in the state, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.

The county clerk shall attach a certificate to the declaration of candidacy showing the date on which the candidate registered as intending to affiliate with the political party the nomination of which he seeks, and indicating that the candidate has not been affiliated with any other political party for the 12-month period immediately preceding the filing of the declaration.

§ 6402. Independent nominees

This chapter does not prohibit the independent nomination of candidates under the provisions of Chapter 3

(commencing at Section 6800) of this division, subject to the following limitations:

(a) A candidate whose name has been on the ballot as a candidate of a party at the direct primary and who has been defeated for that party nomination is ineligible for nomination as an independent candidate. He is also ineligible as a candidate named by a party central committee to fill a vacancy on the ballot for a general election.

(b) No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election.

§ 6430. Qualified parties

A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election.

§ 6490 [Supp. 1974]. Declaration of candidacy

No candidate's name shall be printed on the ballot to be used at a direct primary unless a declaration of his

candidacy is filed not less than 83 and not more than 113 days prior to the direct primary.

The declaration may be made by the candidate or by sponsors on his behalf.

When the declaration is made by sponsors the candidate's affidavit of acceptance shall be filed with the declaration.

§ 6611. Unsuccessful candidate; ineligibility as candidate of another party

A candidate who fails to receive the highest number of votes for the nomination of the political party with which he was registered as affiliated on the date his declaration of candidacy or declaration of acceptance of nomination was filed with the county clerk cannot be the candidate of any other political party.

§ 6803. Group of candidates for presidential electors; designation of presidential and vice presidential candidates

Whenever a group of candidates for presidential electors, equal in number to the number of presidential electors to which this State is entitled, files a nomination paper with the Secretary of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote.

§ 6804. Printing of names on ballot

When a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the names of the presidential candidate and vice presidential candidate designated by that group shall be printed on the ballot.

§ 6830 [Supp. 1974]. Contents

Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed.

§ 6831. Signatures required

Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the pre-

ceding general election, whichever is less, nor more than 1,000.

§ 6833 [Supp. 1974]. Time for filing, circulation and signing; verification

Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p. m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures.

§ 10014. Ballots for voters at primary elections

At a primary election only a nonpartisan ballot shall be furnished to each voter who is not registered as intending to affiliate with any one of the political parties participating in the primary election; and to any voter registered as intending to affiliate with a political party participating in a primary election, there shall be furnished only a ballot of the political party with which he is registered as intending to affiliate.

§ 10232. Inconveniently large ballots

If the election board of a county determines that due to the number of candidates and measures that must be printed on the general election ballot, the ballot will be larger than may be conveniently handled, the board may order nonpartisan offices and local measures omitted from the general election ballot and printed on a separate ballot in a form substantially the same as provided for the general election ballot. If the board so orders, each voter shall receive both ballots, and the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by a voter. The board may, in such case, order the second ballot to be printed on paper of a different tint and assign to those ballots numbers higher than those assigned to the ballots containing partisan offices and statewide ballot measures.

§ 10318. Inconveniently large ballots

If the election board of a county determines that due to the number of candidates and measures that must be printed on the direct primary ballot the ballot will be larger than may be conveniently handled, the board may provide that a nonpartisan ballot shall be given to each partisan voter, together with his partisan ballot, and that the material appearing under the heading "Nonpartisan Offices" on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots. If the board so provides, the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by partisan voters.

§ 18600 [Supp. 1974]. Write-in votes

Any name written upon a ballot shall be counted, unless prohibited by Section 18603, for that name for the

office under which it is written, if it is written in the blank space therefor, whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written.

§ 18601 [Supp. 1974]. Declaration required

Every person who desires to have his name as written on the ballots of an election counted for a particular office shall file a declaration stating that he is a write-in candidate for the nomination for or election to the particular office and giving the title of that office.

§ 18602 [Supp. 1974]. Declaration; filing

The declaration required by Section 18601 shall be filed no later than the eighth day prior to the election to which it applies. It shall be filed with the clerks, registrar of voters, or district secretary responsible for the conduct of the election in which the candidate desires to have write-in votes of his name counted.

§ 18603 [Supp. 1974]. Requirements for tabulation of write-in vote

No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless

(a) A declaration has been filed pursuant to Sections 18601 and 18602 declaring a write-in candidacy for that particular person for that particular office or nomination and

(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

The Court's opinion in these cases, and that in *American Party of Texas* v. *White*, *post*, p. 767, hold—correctly

in my view—that the test of the validity of state legislation regulating candidate access to the ballot is whether we can conclude that the legislation, strictly scrutinized, is necessary to further compelling state interests. See *ante*, at 736; *American Party of Texas* v. *White*, *post*, at 780–781; for, as we recognized in *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968), such state laws "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment. *NAACP* v. *Button*, 371 U. S. 415, 430 (1963); *Bates* v. *Little Rock*, 361 U. S. 516, 522–523 (1960); *NAACP* v. *Alabama*, 357 U. S. 449, 460–461 (1958). Indeed, the right to vote is "a fundamental political right, because preservative of all rights," *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886), and "[o]ther rights, even the most basic, are illusory if the right to vote is undermined," *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964). See also *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964). Thus, when legislation burdens such a fundamental constitutional right, it is not enough that the legislative means rationally promote legitimate governmental ends. Rather,

> "governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. *Shapiro* v. *Thompson*, 394 U. S. [618, 634 (1969)]; *United States* v. *Jackson*, 390 U. S. 570, 582–583 (1968); *Sherbert* v. *Verner*, 374 U. S. 398, 406–409 (1963). And once it be determined that a burden has been

> placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden. See *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958)." *Oregon* v. *Mitchell*, 400 U. S. 112, 238 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

See also *Dunn* v. *Blumstein*, 405 U. S. 330, 336–337 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969); *Williams* v. *Rhodes*, 393 U. S., at 31.

I have joined the Court's opinion in *American Party of Texas* v. *White*, *supra*,[1] because I agree that, although the conditions for access to the general election ballot imposed by Texas law burden constitutionally protected rights, nevertheless those laws "are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *Post*, at 781. I dissent, however, from the Court's holding in these cases that, although the California party disaffiliation rule, Cal. Elections Code § 6830 (d) (Supp. 1974), also burdens constitutionally protected rights, California's compelling state interests "cannot be served equally well in significantly less burdensome ways."

I

The California statute absolutely denies ballot position to independent candidates who, at any time within 12 months prior to the immediately preceding primary election, were registered as affiliated with a qualified political party. Intertwined with Cal. Elections Code §§ 2500–2501 (1961), which require primary elec-

[1] MR. JUSTICE DOUGLAS adheres to the views stated in his opinion dissenting in part in *American Party of Texas* v. *White*, *post*, p. 795.

tions to be held five months before the general election, § 6830 (d) (Supp. 1974) plainly places a significant burden upon independent candidacy—and therefore effectively burdens as well the rights of potential supporters and voters to associate for political purposes and to vote, see *Williams* v. *Rhodes, supra,* at 30; *Bullock* v. *Carter,* 405 U. S. 134, 143 (1972)—because potential independent candidates, currently affiliated with a recognized party, are required to take affirmative action toward candidacy fully *17 months* before the general election. Thus, such candidates must make that decision at a time when, as a matter of the realities of our political system, they cannot know either who will be the nominees of the major parties, or what the significant election issues may be. That is an impossible burden to shoulder. We recognized in *Williams* v. *Rhodes, supra,* at 33, that "the principal policies of the major parties change to some extent from year to year, and . . . the identity of the likely major party nominees may not be known until shortly before the election . . . ." Today, not even the casual observer of American politics can fail to realize that often a wholly unanticipated event will in only a matter of months dramatically alter political fortunes and influence the voters' assessment of vital issues. By requiring potential independent candidates to anticipate, and crystallize their political responses to, these changes and events 17 months prior to the general election, § 6830 (d) (Supp. 1974) clearly is out of step with "the potential fluidity of American political life," *Jenness* v. *Fortson,* 403 U. S. 431, 439 (1971), operating as it does to discourage independent candidacies and freeze the political status quo.

The cases of appellants Storer and Frommhagen pointedly illustrate how burdensome California's party disaffiliation rule can be. Both Storer and Frommhagen sought to run in their respective districts as inde-

pendent candidates for Congress. The term of office for the United States House of Representatives, of course, is two years. Thus, § 6830 (d) (Supp. 1974) required Storer and Frommhagen to disaffiliate from their parties within *seven months* after the preceding congressional election. Few incumbent Congressmen, however, declare their intention to seek re-election seven months after election and only four months into their terms. Yet, despite the unavailability of this patently critical piece of information, Storer and Frommhagen were forced by § 6830 (d) (Supp. 1974) to evaluate their political opportunities and opt in or out of their parties 17 months before the next congressional election.

The Court acknowledges the burdens imposed by § 6830 (d) (Supp. 1974) upon fundamental personal liberties, see *ante,* at 734, but agrees with the State's assertion that the burdens are justified by the State's compelling interest in the stability of its political system, *ante,* at 736. Without § 6830 (d) (Supp. 1974), the argument runs, the party's primary system, an integral part of the election process, is capable of subversion by a candidate who first opts to participate in that method of ballot access, and later abandons the party and its candidate-selection process, taking with him his party supporters. Thus, in sustaining the validity of § 6830 (d) (Supp. 1974), the Court finds compelling the State's interests in preventing splintered parties and unrestricted factionalism and protecting the direct-primary system, *ante,* at 736.[2]

[2] The Court also opines that § 6830 (d) (Supp. 1974) may be "a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party," *ante,* at 735. But the State suggests no reliance upon this alleged interest and we are therefore not at liberty to turn our decision upon our conjecture that this might have been a state objective. In any event, the prospect of such a misuse seems more fanciful than real and, as we said in *Williams* v. *Rhodes,* 393 U. S.

But the identification of these compelling state interests, which I accept, does not end the inquiry. There remains the necessity of determining whether these vital state objectives "cannot be served equally well in significantly less burdensome ways." Compelling state interests may not be pursued by

> "means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP* v. *Button,* 371 U. S. 415, 438 (1963); *United States* v. *Robel,* 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson* [394 U. S. 618, 631 (1969)]. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960)." *Dunn* v. *Blumstein,* 405 U. S., at 343.

While it is true that the Court purports to examine into "less drastic means," its analysis is wholly inadequate. The discussion is limited to these passing remarks, *ante,* at 736:

> "Nor do we have reason for concluding that the device California chose, § 6830 (d) (Supp. 1974), was not an essential part of its overall mechanism to achieve its acceptable goals. As we indicated in *Rosario,* the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound con-

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23, 33 (1968), "[n]o such remote danger can justify [an] immediate and crippling impact on . . . basic constitutional rights . . . ."

> sequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot."

Naturally, the Constitution does not require the State to choose ineffective means to achieve its aims. The State must demonstrate, however, that the means it has chosen are "necessary." *Shapiro* v. *Thompson,* 394 U. S. 618, 634 (1969). See also *American Party of Texas* v. *White, post,* at 780–781.

I have searched in vain for even the slightest evidence in the records of these cases of any effort on the part of the State to demonstrate the absence of reasonably less burdensome means of achieving its objectives. This crucial failure cannot be remedied by the Court's conjecture that other means "*might* sacrifice the political stability of the system of the State" (emphasis added). When state legislation burdens fundamental constitutional rights, as conceded here, we are not at liberty to speculate that the State might be able to demonstrate the absence of less burdensome means; the burden of affirmatively demonstrating this is upon the State. *Dunn* v. *Blumstein, supra,* at 343; *Shapiro* v. *Thompson, supra,* at 634; *Sherbert* v. *Verner,* 374 U. S. 398, 406–409 (1963).

Moreover, less drastic means—which would not require the State to give appellants "instantaneous access to the ballot"—seem plainly available to achieve California's objectives. First, requiring party disaffiliation 12 months before the primary elections is unreasonable on its face. There is no evidence that splintering and factionalism of political parties will result unless disaffiliation is effected that far in advance of the primaries. To the contrary, whatever threat may exist to party stability is more likely to surface only shortly before the primary, when the identities of the potential field of candidates and issues

become known. See *Williams* v. *Rhodes*, 393 U. S., at 33. Thus, the State's interests would be adequately served and the rights of the appellants less burdened if the date when disaffiliation must be effected were set significantly closer to the primaries. Second, the requirement of party disaffiliation could be limited to those independent candidates who actually run in a party primary. Section 6830 (d) (Supp. 1974) sweeps far too broadly in its application to potential independent candidates who, though registered as affiliated with a recognized party, do not run for the party's nomination. Such an independent candidate plainly poses no threat of utilizing the party machinery to run in the primary, and then declaring independent candidacy, thereby splitting the party.

II

I also dissent from the Court's remand, in the case of appellants Hall and Tyner, of the question concerning the constitutionality of the petition requirements imposed upon independent candidates. Under the relevant statutes, Hall and Tyner, candidates for President and Vice President, were required to file signatures equal to 5% of the total vote cast in California's preceding general election. § 6831. However, the pool from which signatures could be drawn excluded all persons who had voted in the primary elections, including voters who had cast nonpartisan ballots. § 6830 (c) (Supp. 1974). Furthermore, circulation of the petitions was not permitted until two months after the primaries, and the necessary signatures were required to be obtained during a 24-day period. § 6833 (Supp. 1974). The Court avoids resolving the constitutionality of these election laws by remanding to the District Court for further proceedings. On remand, the District Court is directed to determine (1) the total vote cast in the last general election as a predi-

cate to computation of the 5% of signatures required by the statutory provision, and (2) the size of the pool to which appellants were required to limit their efforts in obtaining signatures. The Court reasons that these findings are necessary to a determination "whether the available pool is so diminished in size by the disqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President." *Ante*, at 740.

If such a remand were directed in the cases of Storer and Frommhagen I could agree, for in those cases there is a complete absence of data necessary to facilitate determination of the actual percentage of available voters that appellants Storer and Frommhagen were required to secure. A remand in the case of Hall and Tyner, however, is unnecessary because the data upon which relevant findings must be based are already available to us. The data are cited by the Court, *ante*, at 742 n. 12 and at 744 n. 14. Evaluated in light of our decision in *Jenness* v. *Fortson, supra,* the data leave no room for doubt that California's statutory requirements are unconstitutionally burdensome as applied to Hall and Tyner. Official voting statistics published by the California Secretary of State indicate that 6,633,400 persons voted in the 1970 general election. See Secretary of State, Statement of Vote, General Election, November 7, 1972, p. 6. Appellants were required to secure signatures totaling 5% of that number, *i. e.*, 331,670. The statistics also indicate the size of the total pool from which appellants were permitted to gather signatures. The total number of registered voters on September 14, 1972—the last day appellants were permitted to file nomination petitions—was 9,953,124. See Secretary of State, Report of Registration, September 1972, p. 8. Of that number, 6,460,220

registered voters could not sign petitions because they had voted in the 1972 primary elections. See Secretary of State, Statement of Vote, Consolidated Primary Election, June 6, 1972, pp. 3, 4–23. Thus, the total pool of registered voters available to appellants was reduced to approximately 3,492,904, of which the required 331,670 signatures was *9.5%*.[3]

In my view, a percentage requirement even approaching the range of 9.5% serves no compelling state interest which cannot be served as well by less drastic means. To be sure, in *Jenness* we acknowledged that:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." 403 U. S., at 442.

We there upheld the constitutionality of Georgia's election laws requiring potential independent candidates to gather the signatures equal to 5% of the total eligible electorate at the last general election for the office in question. However, candidates were given a full six months to circulate petitions and no restrictions were placed upon the pool of registered voters from which

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[3] The Court's computations, *ante*, at 744 n. 14, suggest that Hall and Tyner need only have collected signatures from 8.1% of the available voter pool. The Court's calculation assumes that the voter pool available to Hall and Tyner included approximately 579,000 persons who may have only voted in *nonpartisan* primaries. Section 6830 (c) (Supp. 1974) makes no such exception; the pool available for signatures is expressly limited to those voters who "did not vote at the immediately preceding primary election . . . ." I agree with the Court, however, that exclusion of persons voting at nonpartisan primaries is not supported by a compelling state interest.

signatures could be drawn. In that circumstance, we found that Georgia imposed no unduly burdensome restrictions upon the free circulation of nominating petitions. We noted:

> "A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who was not even registered at the time of the previous election. No signature on a nominating petition need be notarized." *Id.*, at 438–439 (footnotes omitted).

Thus, although Georgia's 5% requirement was higher than that required by most States, the Court found it "balanced by the fact that Georgia . . . imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." *Id.*, at 442.

California seeks to justify its election laws by pointing to the same substantial interests we identified in *Jenness*, of insuring that candidates possess a modicum of support, and that voters are not confused by the length of the ballot. But in sharp contrast to the election laws we upheld in *Jenness*, California's statutory scheme greatly restricted the pool of registered voters from which appellants Hall and Tyner were permitted to draw signatures. The 5% requirement, in reality, forced them to secure the signatures of 9.5% of the voters permitted by law to sign nomination petitions. Moreover, unlike Georgia's six-month period for gathering signa-

tures, the California election laws required appellants to meet that State's higher percentage requirement in only 24 days. Thus, even conceding the substantiality of its aims, the State has completely failed to demonstrate why means less drastic than its high percentage requirement and short circulation period—such as the statutory scheme enacted in Georgia—will not achieve its interests.

Accordingly, I would reverse the judgment of the District Court dismissing these actions, and remand for further proceedings consistent with this opinion.

Syllabus

AMERICAN PARTY OF TEXAS ET AL. *v.* WHITE, SECRETARY OF STATE OF TEXAS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 72–887. Argued November 5, 1973—Decided March 26, 1974*

Texas laws involved in this litigation provide four methods for nominating candidates in a general election: (1) candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election are nominated by primary election only, and the nominees of these parties automatically appear on the ballot; (2) candidates whose parties poll less than 200,000 votes, but more than 2% of the total vote cast for governor in that election are nominated by primary election or nominating conventions; (3) if the foregoing procedures do not apply, precinct conventions can, pursuant to Tex. Election Code, Art. 13.45 (2) (Supp. 1973), nominate candidates if the party is able, by notarized signatures, to evidence support by at least 1% of the total gubernatorial vote at the last preceding general election or (by a process to be completed within 55 days after the general May primary election) can produce sufficient supplemental petitions with notarized signatures (not including voters who have already participated in any other party's primary election or nominating process) to make up a combined total of the 1%; and (4) under Arts. 13.50 and 13.51, an independent candidate, regardless of the office sought, can qualify by filing within the time prescribed a petition signed by a certain percentage of voters for governor at the last preceding general election in a specified locality, the percentages varying with the offices sought (in this case 3% in a congressional district and 5% in a State Representative's district). In no event, are more than 500 signatures required of a candidate for any "district office." No voter, participating in any other political party nominating process or signing a nominating petition for the same office, may sign an independent's petition. Appellants, minority political parties and their candidates and supporters, and unaffiliated candi-

*Together with No. 72–942, *Hainsworth* v. *White, Secretary of State of Texas,* also on appeal from the same court.

dates, brought actions in the District Court seeking declaratory and injunctive relief against the enforcement of the Texas election laws, which they claimed infringed their associational rights under the First and Fourteenth Amendments and were invidiously discriminatory. They also challenged the practice of printing on absentee ballots only the names of the two major political parties and the State's failure to require printing minority party and independent candidates' names on absentee ballots and the exclusion of minority parties from the benefits of the McKool-Stroud Primary Financing Law of 1972, which provided for public financing from state revenues for primary elections of political parties casting 200,000 or more votes in the last preceding general election for governor. The District Court upheld the constitutionality of the State's election scheme. *Held:*

1. Article 13.45 (2), which does not freeze the status quo but affords minority parties a real and essentially equal opportunity for ballot qualification, does not contravene the First and Fourteenth Amendments and is in furtherance of a compelling state interest. *Storer* v. *Brown*, *ante*, p. 724. Pp. 776–788.

(a) The Equal Protection Clause does not forbid the requirement that small parties proceed by convention rather than primary election. The convention process has not been shown here to be invidiously more burdensome than the primary election, followed by a runoff election where necessary. Pp. 781–782.

(b) So long as the larger parties must demonstrate major voter support at the last election, it is not invidious to require smaller parties (which need make no such demonstration) to establish their position otherwise; and the 1% requirement (which two of the appellant parties were able to meet) imposes no insurmountable obstacle on a small party. Pp. 782–784.

(c) The bar against a person's signing a supplemental petition who has voted in a primary election or participated in a party convention is not unconstitutional, since he may choose to vote or to sign a nominating petition, but not to do both. Nor is it invidious to disqualify those who have voted in a primary from signing petitions for another party seeking ballot position for its candidates for the same offices, where that party had access to the entire electorate and an opportunity to commit voters on primary day. Cf. *Rosario* v. *Rockefeller*, 410 U. S. 752. Pp. 785–786.

(d) The 55-day period provides sufficient time for circulating

supplemental petitions and is not unduly burdensome, nor is the notarization requirement. Pp. 786–787.

2. The percentage provisions in Arts. 13.50 and 13.51 with the 500-signature feature are not unduly burdensome. Requiring independent candidates to evidence a "significant modicum of support" is not unconstitutional, and the record here is devoid of any proof to support the claims of appellant independent candidates (who relied solely on the minimal 500-vote-signature requirement) that these requirements were impermissibly onerous. Pp. 788–791.

3. The challenged McKool-Stroud provisions are not unconstitutional, since they were designed to compensate for primary election expenses to which the major parties alone are subject; and, as the District Court correctly found, "the convention and petition procedure available for small and new parties carries with it none of the expensive election requirements burdening those parties required to conduct primaries." Moreover, the State is not obliged to finance the efforts of every nascent political group seeking ballot placement, like appellant American Party, which failed to qualify for the general election ballot. Pp. 791–794.

4. The District Court erred in sustaining the exclusion of minority parties from the absentee ballot. No justification was offered by appellees for not giving absentee ballot placement to appellant Socialist Workers Party, which satisfied the statutory requirement for demonstrating the necessary community support needed to win general ballot position for its candidates. *Goosby* v. *Osser*, 409 U. S. 512; *O'Brien* v. *Skinner*, 414 U. S. 524. Pp. 794–795.

No. 72–942, affirmed; No. 72–887, 349 F. Supp. 1272, affirmed in part, vacated and remanded in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 795.

Gloria Tanner Svanas argued the cause for appellants in No. 72–887 and filed a brief for appellant American Party of Texas. *Michael Anthony Maness* filed a brief for appellants Texas New Party et al. in No. 72–887. *Robert W. Hainsworth*, appellant *pro se*, argued the cause and filed briefs in No. 72–942.

John L. Hill, Attorney General of Texas, argued the cause for appellee in both cases. With him on the brief were *Larry F. York*, First Assistant Attorney General, and *J. C. Davis* and *Sam L. Jones, Jr.*, Assistant Attorneys General.

MR. JUSTICE WHITE delivered the opinion of the Court.

These cases began when appellants, minority political parties and their candidates, qualified voters supporting the minority party candidates, and independent unaffiliated candidates, brought four separate actions in the United States District Court for the Western District of Texas against the Texas Secretary of State seeking declaratory and injunctive relief against the enforcement of various sections of the Texas Election Code.

The American Party of Texas sought ballot position at the general election in 1972 for a slate of candidates for various statewide and local officers, including governor and county commissioner.[1] The New Party of Texas wanted ballot recognition for its candidates for the general election for governor, Congress, state representative and county sheriff. The Socialist Workers Party made similar claims with respect to its candidates for governor, lieutenant governor and United States Senator.[2] Laurel Dunn, a nonpartisan candidate, at-

[1] Although the November 1972 election has been completed and this Court may not grant retrospective relief that would affect the outcome, this case is not moot. See *Rosario* v. *Rockefeller*, 410 U. S. 752, 756 n. 5 (1973); see also *Storer* v. *Brown*, *ante*, at 737 n. 8.

[2] The District Court dismissed the complaints of the Texas Socialist Workers Party and another minority party, La Raza Unida, insofar as they challenged Art. 13.45 (2) (Supp. 1973) of the Election Code, because they lacked standing in view of their later certification by appellee for a place on the general ballot. *Raza Unida Party* v. *Bullock*, 349 F. Supp. 1272, 1276 (WD Tex. 1972). La Raza Unida has not appealed and the Socialist Workers Party, although an

tempted to run for the United States House of Representatives from the Eleventh Congressional District. In his action, he represented himself and other named independent candidates for state and local offices. Finally, Robert Hainsworth sought election as state representative from District No. 86.

In these actions, it was alleged that, by excluding appellants from the general election ballot, various provisions of the Texas Election Code infringed their First and Fourteenth Amendment right to associate for the advancement of political beliefs and invidiously discriminated against new and minority political parties, as well as independent candidates. Appellants sought to enjoin the enforcement of the challenged provisions in the forthcoming November 1972 general election. They also challenged the failure of the Texas law to require printing minority party and independent candidates on absentee ballots and the exclusion of minority parties from the benefits of the McKool-Stroud Primary Law of 1972. The individual cases involving the parties in No. 72–887 were consolidated, and a statutory three-judge District Court was convened. Following a trial, the District Court denied all relief after holding that, in their totality, the challenged provisions served a compelling state interest and did not suffocate the election process. *Raza Unida Party* v. *Bullock*, 349 F. Supp. 1272 (WD Tex. 1972). Hainsworth, appellant in No. 72–942, was

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appellant here, does not appear to challenge the District Court's judgment that it had no standing to challenge Art. 13.45 (2). The District Court's dismissal, however, did not go beyond the attack on Art. 13.45 (2). It does not appear that ballot qualification would affect the standing of the Socialist Workers Party to challenge the Texas Primary Financing Law or the denial of absentee voting privileges to it. Both issues were presented in the Jurisdictional Statement filed by the party and appear as minor themes in the party's brief on the merits.

also subsequently denied relief on similar grounds. Two separate appeals were taken, and we noted probable jurisdiction. 410 U. S. 965. We affirm the judgment of the District Court in No. 72–942, and in No. 72–887, except as the latter relates to the Socialist Workers Party and Texas' absentee ballot provisions.

I

The State of Texas has established a detailed statutory scheme for regulating the conduct of political parties as it relates to qualifying for participation in the electoral process. Under the laws challenged in this case, four methods are provided for nominating candidates to the ballot for the general election.[3]

Candidates of political parties whose gubernatorial candidate polled more than 200,000 votes in the last general election may be nominated by primary election only, and the nominees of these parties automatically appear on the ballot. Tex. Election Code, Art. 13.02 (1967).[4] Texas holds a statewide primary for these

[3] Texas also allows write-in votes in most elections, and they are counted. Tex. Election Code, Arts. 6.05, 6.06 (Supp. 1974).

[4] "On primary election day in 1952 and every two (2) years thereafter, candidates for Governor and for all other State offices to be chosen by vote of the entire State, and candidates for Congress and all district offices to be chosen by the vote of any district comprising more than one (1) county, to be nominated by each organized political party that cast two hundred thousand (200,000) votes or more for governor at the last general election, shall, together with all candidates for offices to be filled by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party." Tex. Election Code, Art. 13.02 (1967).

We describe the law as it existed in 1972. While these cases were pending in this Court, the Texas Legislature amended Art. 13.02 of the Election Code to the extent that the mandatory primary election requirement, and the resulting automatic general election ballot position, are now triggered only when an organized political party casts

major parties on the first Saturday in May, with a runoff primary the first Saturday in June, should no candidate garner a majority. Art. 13.03 (1967).

Candidates of parties whose candidate polled less than 200,000 votes, but more than 2% of the total vote cast for governor in the last general election may be nominated and thereby qualify for the general election ballot by primary election or nominating conventions. Art. 13.45 (1) (Supp. 1973).[5] The nominating conventions

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20% or more of the votes cast for governor at the last general election and not the previous 200,000 votes. At oral argument, counsel for appellants maintained that the Texas Legislature raised the automatic ballot qualification figure to 20% after the La Raza Unida Party gubernatorial candidate polled more than 2% of the total vote in the 1972 general election. Counsel further intimated that the law will be changed again should a minority party fulfill the new requirements. Tr. of Oral Arg. 7–8. Whatever their merits, we do not reach these contentions. The issues in this case revolve principally around the signature requirements for minority parties and independent candidates and are unaffected by the above amendment or by the amendment referred to in n. 5, *infra*.

[5] "Any political party whose nominee for Governor in the last preceding general election received as many as two percent of the total votes cast for Governor and less than two hundred thousand votes, may nominate candidates for the general election by primary elections held in accordance with the rules provided in this code for the primary elections of parties whose candidate for Governor received two hundred thousand or more votes at the last general election; or such party may nominate candidates for the general election by conventions as provided in [Arts. 13.47 and 13.48]." Tex. Election Code, Art. 13.45 (1) (Supp. 1973).

During the pendency of these cases in this Court, the Texas Legislature, in the same Act amending Art. 13.02, amended Art. 13.45 (1). Starting in 1976, a political party whose nominee for governor in the last preceding general election received as many as 2% but less than 20% of the total votes cast for governor *must* nominate its candidates for the general election by *conventions*. For the 1974 elections, however, the amendment to Art. 13.45 (1) provides that those political parties receiving between 2%

are held sequentially, with the precinct conventions on the same date as the statewide primaries for the major parties (the first Saturday in May), the county conventions on the following Saturday, and the state convention on the second Saturday in June. Art. 13.47 (Supp. 1974); Art. 13.48 (1967).

Because their candidates polled less than 2% of the total gubernatorial vote in the preceding general election or they did not nominate a candidate for governor, the political parties in this litigation were required to pursue the third method for ballot qualification: precinct nominating conventions and if the required support was not evidenced at the conventions, the circulation of petitions for signatures. Art. 13.45 (2) (Supp. 1973).[6]

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and 20% of the 1972 gubernatorial vote will continue to have a choice between primary elections and conventions.

[6] "Any political party whose nominee for governor received less than two percent of the total votes cast for governor in the last preceding general election, or any new party, or any previously existing party which did not have a nominee for governor in the last preceding general election, may also nominate candidates by conventions as provided in [Arts. 13.47 and 13.48], but in order to have the names of its nominees printed on the general election ballot there must be filed with the secretary of state, within 20 days after the date for holding the party's state convention, the list of participants in precinct conventions held by the party in accordance with [Arts. 13.45a and 13.47] of this code, signed and certified by the temporary chairman of each respective precinct convention, listing the names, addresses (including street address or post-office address), and registration certificate numbers of qualified voters attending such precinct conventions in an aggregate number of at least one percent of the total votes cast for governor at the last preceding general election; or if the number of qualified voters attending the precinct conventions is less than that number, there must be filed along with the precinct lists a petition requesting that the names of the party's nominees be printed on the general election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least one percent of the total votes cast for governor at the last general election. The address and registration certificate

Finally, unaffiliated nonpartisan or independent candidates such as Dunn and Hainsworth could qualify by filing within a fixed period a written application or petition signed by a specified percentage of the vote cast for governor in the relevant electoral district in the last general election. Arts. 13.50, 13.51 (1967).[7]

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number of each signer shall be shown on the petition. No person who, during that voting year, has voted at any primary election or participated in any convention of any other party shall be eligible to sign the petition. To each person who signs the petition there shall be administered the following oath, which shall be reduced to writing and attached to the petition: 'I know the contents of the foregoing petition, requesting that the names of the nominees of the ———— Party be printed on the ballot for the next general election. I am a qualified voter at the next general election under the constitution and laws in force, and during the current voting year I have not voted in any primary election or participated in any convention held by any other political party.' The petition may be in multiple parts. One certificate of the officer administering the oath may be so made as to apply to all to whom it was administered. The petition may not be circulated for signatures until after the date set by [Art. 13.03] of this code for the general primary election. Any signatures obtained on or before that date are void. Any person who signs a petition after having voted in a primary election or participated in a convention of any other party during the same voting year is guilty of a misdemeanor and upon conviction shall be fined not less than $100 nor more than $500.

"The chairman of the state executive committee shall be responsible for forwarding the precinct lists and petition to the secretary of state.

"At the time the secretary of state makes his certifications to the county clerks as provided in [Art. 1.03] of this code, he shall also certify to the county clerks the names of parties subject to this subdivision which have complied with its requirements, and the county clerks shall not place on the ballot the names of any nominees of such a party which have been certified directly to them unless the secretary of state certifies that the party has complied with these requirements." Tex. Election Code, Art. 13.45 (2) (Supp. 1973).

[7] "The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent can-

II

We consider first the appeals of the political parties and their supporters. Article 13.45 (2) (Supp. 1973) of the Texas Election Code, the validity of which is at issue

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didates, after a written application signed by qualified voters addressed to the proper officer, as herein provided, and delivered to him within thirty days after the second primary election day, as follows:

"If for an office to be voted for throughout the state, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of more than one county, the application shall be signed by three per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a county office, the application shall be signed by five per cent of the entire vote cast for Governor in such county at the last preceding general election, and shall be addressed to the county judge.

"If for a precinct office, the application shall be signed by five per cent of the entire vote cast for Governor in such precinct at the last preceding general election, and shall be addressed to the county judge.

"Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county, or precinct office need not exceed five hundred.

"No application shall contain the name of more than one candidate. No person shall sign the application of more than one candidate for the same office; and if any person signs the application of more than one candidate for the same office, the signature shall be void as to all such applications. No person shall sign such application unless he is a qualified voter, and no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for

here, requires that the political parties to which it applies nominate candidates through the process of precinct, county, and state conventions. The party must also evidence support by persons numbering at least 1% of the total vote cast for governor at the last preceding general election. In 1972, this number was approximately 22,000 electors. Two opportunities are offered to satisfy the 1% signature requirement. At the statutorily mandated

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an office for which a nomination was made at either such primary election.

"The application shall contain the following information with respect to each person signing it: his address and the number of his poll tax receipt or exemption certificate and the county of issuance; or if he is exempt from payment of a poll tax and not required to obtain an exemption certificate, the application shall so state.

"Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to the officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such withdrawal, the person shall be free to sign the application of another candidate for the same office." Tex. Election Code, Art. 13.50 (1967).

"To every citizen who signs such application, there shall be administered the following oath, which shall be reduced to writing and attached to such application: 'I know the contents of the foregoing application; I have not participated in the general primary election or the runoff primary election of any party which has nominated, at either such election, a candidate for the office for which I desire ———— (here insert the name of the candidate) to be a candidate; I am a qualified voter at the next general election under the Constitution and laws in force and have signed the above application of my own free will.' One certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered." Art. 13.51 (1967).

precinct nominating conventions, held on the first Saturday in May and the same day as the major party primary, the party must prepare a list of all participants, who must be qualified voters, along with other pertinent information. The list is to be forwarded to the Secretary of State within 20 days after the convention. If it reveals the necessary support and if the party has satisfied the other statutory requirements imposed upon all political parties, the Secretary of State will certify that the party is entitled to be placed on the general election ballot.

Should the party not obtain the requisite 1% convention participation, supplemental petitions may be circulated for signature. When these are signed by a sufficient number of qualified voters in addition to the convention lists to make a combined total of the requisite 1%, the party qualifies for the ballot. Approximately 55 days after the general primary election in May are allotted for the supplementation process. A voter who has already participated in any other party's primary election or nominating process is ineligible to sign the petition. Furthermore, each signatory must be administered and sign an oath that he is a qualified voter and has not participated in any other party's nominating or qualification proceedings. The oath must also be notarized.

The American Party of Texas was able to secure only 2,732 signatures at its precinct conventions in May 1972. By the deadline for filing the precinct lists and supplemental petitions, the total had risen to 7,828, far short of the over 22,000 required signatures. Brief for American Party of Texas 2–3.[8] The Texas New Party ap-

[8] Prior to the convening of the three-judge court, the single-judge District Court had temporarily restrained appellee from refusing to accept and file supplemental nominating petitions obtained by the American Party of Texas between the statutory

parently made no effort to comply with the 1% requirement.[9] Two relatively small parties, however, which were also plaintiffs in this litigation, La Raza Unida Party and the Socialist Workers Party, complied with the qualification provisions of Art. 13.45 (2) (Supp. 1973) and were placed on the general election ballot.

The party appellants challenge various aspects of the Texas ballot qualification system as they interact with each other: the 1% support requirement with its precinct conventions and petition apparatus, the preprimary ban on petition circulation, the disqualification from signing of those voters participating in another party's nominating process, the 55-day limitation on securing signatures, and the notarization requirement.[10] They assert that

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deadline for filing them, June 30, 1972, and September 1, 1972. During the additional court-ordered circulation period, the American Party of Texas garnered 17,678 additional signatures, bringing their total to over 25,000. Brief for American Party of Texas 5. In its final order, the three-judge District Court dissolved the restraining order and declared all signatures gathered during the extended period to be null and void. 349 F. Supp., at 1286. This Court denied a subsequent application for a temporary restraining order, 409 U. S. 803 (1972).

[9] Tr. of Oral Arg. 24.

[10] Appellants also challenged two aspects of the Texas Election Code unrelated to ballot qualification: exclusion from public financing for nomination and ballot qualification expenses and restrictions on the availability of absentee ballots. These provisions are discussed separately in Parts IV and V, *infra*.

The American Party and Texas New Party challenged in the District Court on equal protection and due process grounds the requirement of Art. 13.47a (1) (1967) that a person seeking nomination as a minority party candidate comply with Art. 13.12 and file a declaration to this effect approximately three months before the party primaries and conventions. The District Court upheld this provision, noting that it applied to *all* political parties. In this Court, only the Texas New Party has discussed this restriction. While this appellant seems to be arguing that this requirement, along with all others imposed upon minority political parties, makes its ballot

these preconditions for access to the general election ballot are impermissible burdens on rights secured by the First and Fourteenth Amendments and violate the Equal Protection Clause of the Fourteenth Amendment as invidious discriminations against new or small political parties.

We have concluded that these claims are without merit. We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests, *Storer* v. *Brown*, *ante*, at 729–733.[11] But we also agree with the District

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qualification more burdensome, we are unable to distinguish this contention from the party's overall attack on the Texas statutory scheme. As such, it must fail for the reasons discussed in Part II of the opinion. Moreover, appellant readily concedes that "[t]his requirement is identical to that imposed upon prospective candidates for a major party nomination by Art. 13.12." Brief for Texas New Party 7. We do not understand appellant to be arguing that the State may impose no deadline for declaring one's candidacy. Nor do we read its brief on the merits as challenging the reasonableness of the three-month benchmark chosen by Texas. Under these circumstances, we affirm the judgment of the District Court on this point.

[11] "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP* v. *Button*, 371 U. S. 415, 438 (1963)." *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968). See also *Kusper* v. *Pontikes*, 414 U. S. 51, 56–59 (1973).

Court that the foregoing limitations, whether considered alone or in combination, are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways.

It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention. See *Storer* v. *Brown*, *ante*, at 733–736. Neither can we take seriously the suggestion made here that the State has invidiously discriminated against the smaller parties by insisting that their nominations be by convention, rather than by primary election. We have considered the arguments presented, but we are wholly unpersuaded by the record before us that the convention process is invidiously more burdensome than the primary election, followed by a runoff election where necessary, particularly where the major party, in addition to the elections, must also hold its precinct, county, and state conventions to adopt and promulgate party platforms and to conduct other business.[12] If claiming an equal protection violation, the appellants' burden was to demonstrate in the first instance a discrimination against them of some substance. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson* v. *Skrupa*, 372 U. S. 726, 732 (1963) (footnote omitted). Appellants' burden is not satisfied by mere assertions that small parties must proceed by convention when major parties are permitted to choose their candidates by primary election. The procedures are different, but

[12] See, *e. g.*, Tex. Election Code, Arts. 13.33, 13.34, 13.35, 13.37, 13.38 (1967, Supp. 1973, Supp. 1974).

the Equal Protection Clause does not necessarily forbid the one in preference to the other.[13]

To obtain ballot position, the parties subject to Art. 13.45 (2) (Supp. 1973), as were these appellants, were also required to demonstrate support from electors equal in number to 1% of the vote for governor at the last general election. Appellants apparently question whether they must file any list of supporters where the major parties are required to file none. But we think that the State's admittedly vital interests[14] are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of commnuity support. So long as the larger parties must demonstrate major support among the electorate at

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[13] "The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams* v. *Rhodes, supra.*" *Jenness* v. *Fortson,* 403 U. S. 431, 441–442 (1971).

[14] Appellants concede, as we think they must, that the objectives ostensibly sought by the State, *viz.*, preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion, are compelling. Brief for Texas New Party 18–19. See, *e. g., Rosario* v. *Rockefeller,* 410 U. S., at 761; *Dunn* v. *Blumstein,* 405 U. S. 330, 345 (1972); *Bullock* v. *Carter,* 405 U. S. 134, 145 (1972); *Williams* v. *Rhodes,* 393 U. S., at 32. As we said only recently in *Jenness* v. *Fortson, supra,* at 442:

"There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner. Of course, what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the electorate be real, not "merely theoretical." *Jenness* v. *Fortson*, 403 U. S. 431, 439 (1971).

The District Court recognized that any fixed percentage requirement is necessarily arbitrary, but we agree with it that the required measure of support—1% of the vote for governor at the last general election and in this instance 22,000 signatures—falls within the outer boundaries of support the State may require before according political parties ballot position.[15] To demonstrate this degree of support does not appear either impossible or impractical, and we are unwilling to assume that the requirement imposes a substantially greater hardship on minority party access to the ballot.[16] Two political par-

[15] The District Court balanced this lenient 1% petition requirement against what it thought was a somewhat burdensome requirement of precinct, county, and state conventions and concluded that, as a whole, the system was valid. Actually, save the precinct nominating conventions, the party nominating convention process is unrelated to ballot qualification and corresponds more to the democratic management of the political party's internal affairs.

[16] As we have already indicated, the nominees of the two major parties are automatically placed on the general election ballot, but this is only because these parties have recently demonstrated substantial voter appeal. Texas has chosen this reasonable way to measure public support for the more established political parties. We do not understand appellants to argue that the Democratic and Republican Parties in Texas must also be required to circulate petitions and garner the requisite 1% showing. We further doubt that appellants would care to be forced to conduct a primary

ties which were plaintiffs in this very litigation qualified for the ballot under Art. 13.45 (2) (Supp. 1973) in the 1972 election. It is not, therefore, immediately obvious that the Article, on its face or as it operates in practice, imposes insurmountable obstacles to fledgling political party efforts to generate support among the electorate and to evidence that support within the time allowed.

The aspiring party is free to campaign before the primary and to compete with the major parties for voter support on primary election and precinct convention day. Any voter, however registered, may attend the new party's precinct convention and be counted toward the necessary 1% level. Unlike the independent candidate under Texas law, see *infra*, at 788, and his California counterpart, see *Storer* v. *Brown*, *ante*, at 738, a party qualifying under Art. 13.45 (2) (Supp. 1973) need not wait until the primary to crystallize its support among the voters. It is entitled to compete before the primary election *and* to count noses at its convention on primary day, just as the major parties and their candidates count their primary votes. Furthermore, should they fall short of the magic figure, they have another chance—they may make up the shortage and win ballot position by circulating petitions for signature for a period of 55 days beginning after the primary and ending 120 days prior to the general election.

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election in every precinct in each of Texas' 254 counties. Cf. *Jenness* v. *Fortson*, *supra*, at 441. Moreover, the major parties, like their smaller or newer counterparts, must satisfy the same statutory qualifications as to declaration of candidacy, certifications of nominating process results, and the like. Texas has provided alternative routes to the ballot—statewide primaries and precinct conventions—and it is problematical at best which is more onerous in fact. It is sufficient to note that the system does not create or promote a substantial imbalance in the relative difficulty of each group to qualify for the ballot.

It is true that at this juncture the pool of possible supporters is severely reduced, for anyone voting in the just-completed primary is no longer qualified to sign the petition requesting that the petitioning party and its nominees for public office be listed on the ballot. Appellants attack this restriction, but, as such, it is nothing more than a prohibition against any elector's casting more than one vote in the process of nominating candidates for a particular office. Electors may vote in only one party primary; and it is not apparent to us why the new or smaller party seeking voter support should be entitled to get signatures of those who have already voted in another nominating primary and have already demonstrated their preference for other candidates for the same office the petitioning party seeks to fill. We think the three-judge District Court in *Jackson* v. *Ogilvie,* 325 F. Supp. 864, 867 (ND Ill.), aff'd, 403 U. S. 925 (1971), aptly characterized the situation in upholding a state election law provision preventing a voter from both voting in the primary and signing an independent election petition:

> "Thus, the state's scheme attempts to ensure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nominating petition. He cannot have it both ways." [17]

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[17] The parties have not brought to our attention any decision holding that as a constitutional matter, a State is obligated to allow a voter to vote in a party primary and sign a nominating petition. It is true that under the Georgia system in *Jenness* v. *Fortson, supra,* the State had apparently decided that its legitimate goals would not be compromised by allowing voters to sign a petition even though they have signed others and participated in a party primary. Nothing in that decision, however, can be read to impose upon the States the affirmative duty to allow voters to move freely from one to the other method of nominating candidates for the

We have previously held that to protect the integrity of party primary elections, States may establish waiting periods before voters themselves may be permitted to change their registration and participate in another party's primary. *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973). Cf. *Kusper* v. *Pontikes*, 414 U. S. 51 (1973). Likewise, it seems to us that the State may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process. At least where, as here, the political parties had access to the entire electorate and an opportunity to commit voters on primary day, we see nothing invidious in disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot position for its candidates for the same offices.

Neither do we consider that the 55 days is an unduly short time for circulating supplemental petitions. Given that time span, signatures would have to be obtained only at the rate of 400 per day to secure the entire 22,000, or four signatures per day for each 100 canvassers—only two each per day if half the 22,000 were obtained at the precinct conventions on primary day. A petition procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required

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same public office. This reading becomes all the more evident in light of the fact that *Jackson* v. *Ogilvie*, 325 F. Supp. 864 (ND Ill. 1971), was affirmed on the same day that *Jenness* was decided, 403 U. S. 925. Indeed, the federal court decisions with which we are familiar agree with *Jackson* v. *Ogilvie* and reflect the views we adopt here. See, *e. g.*, *Moore* v. *Board of Elections for the District of Columbia*, 319 F. Supp. 437 (DC 1970); *Wood* v. *Putterman*, 316 F. Supp. 646 (Md.), aff'd, 400 U. S. 859 (1970); *Socialist Workers Party* v. *Rockefeller*, 314 F. Supp. 984 (SDNY), aff'd, 400 U. S. 806 (1970).

the States to do the impossible. *Dunn* v. *Blumstein*, 405 U. S. 330, 360 (1972). Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization. Constitutional adjudication and common sense are not at war with each other, and we are thus unimpressed with arguments that burdens like those imposed by Texas are too onerous, especially where two of the original party plaintiffs themselves satisfied these requirements.[18]

Finally, there remains another facet to the signature requirement. Article 13.45 (2) (Supp. 1973) provides that all signatures evidencing support for the party, whether originating at the precinct conventions or with supplemental petitions circulated after primary day, must be notarized. The parties object to this requirement, but make little or no effort to demonstrate its impracticability or that it is unusually burdensome. The District Court determined that it was not, indicating that one of the plaintiff political parties had conceded as much. The District Court also found no alternative if the State was to be able to enforce its laws to prevent voters from crossing over or from voting twice for the same office. On the record before us, we are in no position to disagree.

In sum, Texas "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Jenness* v. *Fortson*, 403 U. S., at 439. It

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[18] The 55-day period for petition circulation terminates 120 days before the general election. We agree with the District Court that some cutoff period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges. We also believe that in view of the overall statutory scheme and particularly in light of the "second chance" Texas affords smaller political parties to qualify by petition, the 120-day pre-election filing deadline is neither unreasonable nor unduly burdensome.

affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more.

III

Appellants Dunn and Hainsworth challenged Arts. 13.50 and 13.51, which govern the eligibility of nonpartisan or independent candidates for general election ballot position. Regardless of the office sought, an independent candidate must file, within 30 days after the second or runoff primary election, a written petition signed by a specified number of qualified voters. The signatures required vary with the office sought. Dunn was required to obtain signatures equaling 3% of the 1970 vote for governor in the congressional district in which he desired to run; Hainsworth, a candidate for the State House of Representatives, needed 5% of the same vote in his locality. Article 13.50, however, states that in no event would candidates for any "district office," as Dunn and Hainsworth were,[19] be required to file more that 500 signatures. The law also provides that a voter may not sign more than one petition for the same office and is barred from signing any petitions if he voted at either primary election of any party at which a nomination was made for that office. Each voter signing an independent candidate's petition must also subscribe to a notarized oath declaring his nonparticipation in any political party's nominating process. Art. 13.51.

Dunn and Hainsworth contend that the First and Fourteenth Amendments, including the Equal Protection Clause, forbid the State to impose unduly burdensome conditions on their opportunity to appear on the general election ballot. The principle is unexception-

[19] Tex. Election Code, Art. 14.01.

able, cf. *Storer* v. *Brown, ante,* at 738, 739, 740, 746; but requiring independent candidates to evidence a "significant modicum of support" [20] is not unconstitutional. Demanding signatures equal in number to 3% or 5% of the vote in the last election is not invalid on its face, see *Jenness* v. *Fortson, supra,* and with a 500-signature limit in any event, the argument that the statute is unduly burdensome approaches the frivolous.

It is true that those who have voted in the party primaries are ineligible to sign an independent candidate's petition. In theory at least, the consequence of this restriction is that the pool of eligible signers of an independent candidate's petition, calculated by subtracting from all eligible voters in the 1972 primaries all those who voted in the primary and then adding new registrations since the closing of the registration books, could be reduced nearly to zero or to so few qualified electors that securing even 500 of them would be an impractical undertaking. But this likelihood seems remote, to say the least, particularly when it will be very likely that a substantial percentage, perhaps 25%, of the total registered voters will not turn out for the primary and will thus be eligible to sign petitions,[21] along with all new registrants

[20] *Jenness* v. *Fortson,* 403 U. S., at 442; see *supra,* at 782.

[21] This 25% approximation may actually be a conservative projection. Voting statistics compiled by the Office of Secretary of State indicate that 2,306,910 votes were cast for governor in the first 1972 Texas primaries of both parties and 2,036,770 in the runoff primary elections. As of January 31, 1972, the last date before the primaries on which aggregate statewide statistics are available, 3,872,462 voters had registered in Texas. Thus, without accounting for any increased registration by the time of the primaries, registered voter turnout ranged from approximately 60% to 53%, respectively. It is, of course, conceivable that some voters participating in the runoff primaries had not voted in the first primary, thereby raising to some figure higher than 60% those voters who were disqualified under Texas law from signing the nominating peti-

since the closing of the registration books prior to the primary. In any event, nothing in the record before us indicates what the total vote in the last election was in the districts at issue here, nothing showing what the primary vote would be or was in 1972, and nothing suggesting what the size of the pool of eligible signers might be. As the District Court noted, the independent candidates presented "absolutely no factual basis in support of their claims" that Art. 13.50 imposed unduly burdensome requirements. 349 F. Supp., at 1284. Dunn and Hainsworth relied solely on the minimal 500-signature requirement. This was simply a failure of proof, and

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tions of independent candidates. We are nevertheless unwilling to assume based on the evidence before us that this would be such a high number of voters that independent candidates would be left with an insignificant pool of eligible voters to sign their petitions.

Comparative voting statistics on primary election participation in other States also suggest that the 25% estimate is modest. In California, for example, official figures reveal the following percentage of total registered voters at all party primaries for the past seven biennial elections:

1960	62.80%
1962	63.53%
1964	71.94%
1966	64.67%
1968	72.21%
1970	62.23%
1972	70.95%

California Secretary of State, Statement of Vote, Consolidated Primary Election, June 6, 1972, p. 3.

The 1972 Democratic Party presidential primaries in Florida and Massachusetts witnessed voter turnout of approximately 59% and 56%, respectively. 30 Congressional Quarterly 481, 862, 1655 (1972). The realistic prospect of a postprimary pool of much higher than 25% is even greater in light of the fact that Texas has traditionally trailed behind national voter participation averages by a sizable margin. C. McCleskey, The Government and Politics of Texas 38 (4th ed. 1972).

for that reason we must affirm the District Court's judgments with respect to these appellants.[22]

IV

In response to this Court's decision in *Bullock* v. *Carter*, 405 U. S. 134 (1972), invalidating the Texas filing-fee requirements, the state legislature enacted as a temporary measure the McKool-Stroud Primary Financing Law of 1972. Tex. Election Code, Art. 13.08c–1.[23] The statute

[22] The independent candidates also challenged the notary provision of Art. 13.51. Nothing that we have been shown, however, convinces us that the notarial requirement for independent candidates is more suspect or burdensome than that imposed upon the political parties. See *supra*, at 787.

[23] Since it was a temporary measure, this primary financing legislation has expired and it has been replaced by new legislation, the Primary Conduct and Financing Law of 1974. Tex. Election Code, Art. 13.08c–2 (Supp. 1974). This scheme provides for a schedule of candidate filing fees for access to the general primary election ballot. The filing fee is waived should the primary candidate file a nominating petition signed by a designated number of voters. Those filing fees paid to the county chairman of a political party holding a primary election are used to pay the party's primary expenses. Any remaining costs are defrayed by the State in accordance with a voucher system substantally identical to that provided in the McKool-Stroud Primary Financing Law of 1972 challenged by appellants. The new legislation is also comparable to its predecessor insofar as only those political parties required to conduct primary elections, which under recent amendments to the Texas Election Code are only those parties polling 20% or more of the vote cast for governor in the last general election, see n. 4, *supra*, are eligible for state funding.

The recent amendments to the 1972 financing law have not mooted this controversy. If appellants were correct that they had been unconstitutionally deprived of public financing for their 1972 qualification and nomination expenses, they might be able to compel the State to reimburse them. Under these circumstances and in view of the special nature of election challenges in general and this short-term funding measure in particular, we proceed to evaluate appellants' claims on the merits.

generally provided for public financing from state revenues for primary elections of only those political parties casting 200,000 or more votes for governor in the last preceding general election. On its face, therefore, the law precluded any payment of state funds to minor political parties to reimburse them for the costs incurred in conducting their nominating and ballot qualification processes.[24] In all, over $3,000,000 was appropriated by the state legislature to the two major political parties to defray their expenses in connection with the 1972 primary elections. Brief for American Party of Texas 19–20, n. 41.

The District Court rejected all constitutional challenges to the law, noting that the statute was designed to compensate for primary election expenses and that "[t]he convention and petition procedure available for small or new parties carries with it none of the expensive election requirements burdening those parties required to conduct primaries," 349 F. Supp., at 1285. The District Court also emphasized that in response to the State's argument in *Bullock* v. *Carter* that state financing of primary elections would necessitate defining those political parties entitled to financial aid and would invite new charges of discrimination, this Court pointed out that under Texas law only those parties whose gubernatorial candidates received more than 200,000 votes were required to conduct primaries and said "[w]e are not persuaded that Texas would be faced with an impossible task in distinguishing

[24] The American Party has alleged that by virtue of the State's compulsory nominating and qualification procedures, it was forced to incur extraordinary costs, including the printing of 12,000 signature sheets, payment of at least 50¢ as a statutory notary fee for over 22,000 signatures, and expenditures for distributing, collecting, and filing petitions.

between political parties for the purpose of financing primaries." 405 U. S., at 147.[25]

We affirm the judgment of the District Court. All political parties who desire ballot position, including the major parties, must hold precinct, county, and state conventions. See, *e. g.*, Tex. Election Code, Arts. 13.33, 13.34, 13.35, 13.38, 13.45, 13.45a, 13.47 (1967, Supp. 1973, Supp. 1974). The State reimburses political parties for none of the expenses in carrying out these procedures. New parties and those with less than 2% of the vote in the last election are permitted to nominate their candidates for office in the course of their convention proceedings. The major parties may not do so and must conduct separate primary elections. As we understand it, it is the expense of these primaries that the State defrays in whole or in part. As far as the record before us shows, none of these reimbursed primary expenses are incurred by minority parties not required to hold primaries. They must undergo expense, to be sure, in holding their conventions and accumulating the necessary signatures to

[25] "Appellants strenuously urge that apportioning the cost among the candidates is the only feasible means for financing the primaries. They argue that if the State must finance the primaries, it will have to determine which political bodies are 'parties' so as to be entitled to state sponsorship for their nominating process, and that this will result in new claims of discrimination. Appellants seem to overlook the fact that a similar distinction is presently embodied in Texas law since only those political parties whose gubernatorial candidate received 200,000 or more votes in the last preceding general election are required to conduct primary elections. Moreover, the Court has recently upheld the validity of a state law distinguishing between political parties on the basis of success in prior elections. *Jenness* v. *Fortson, supra.* We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties for the purpose of financing primaries." 405 U. S., at 147 (footnote omitted).

qualify for the ballot, but we are not persuaded that the State's refusal to reimburse for these expenses is any discrimination at all against the smaller parties and if it is, that it is also a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment. We are unconvinced, at least based upon the facts presently available, that this financing law is an "exclusionary mechanism" which "tends to deny some voters the opportunity to vote for a candidate of their choosing" or that it has "a real and appreciable impact on the exercise of the franchise." *Bullock* v. *Carter,* 405 U. S., at 144.

We should also point out that the appellant American Party mounts the major challenge to the primary financing law. The party, however, failed to qualify for the general election ballot; and we cannot agree that the State, simply because it defrays the expenses of party primary elections, must also finance the efforts of every nascent political group seeking to organize itself and unsuccessfully attempting to win a place on the general election ballot.

V

Under Art. 5.05 (Supp. 1974) otherwise qualified voters in Texas may vote absentee in a primary or general election by personal appearance at the county clerk's office or by mail. It is the State's practice, however, to print on the absentee ballot only the names of the two major, established political parties, the Democrats and the Republicans. *Raza Unida Party* v. *Bullock,* 349 F. Supp., at 1283–1284.

The District Court sustained the exclusion of minority parties from the absentee ballot, relying on the presumption of constitutionality of state laws, *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969), and the rationality of not incurring the expense of printing absentee ballots for parties without substantial voter

support. The Socialist Workers Party, however, satisfied the statutory requirement for demonstrating the necessary community support needed to win general ballot position for its candidates, and with respect to this appellant, the unavailability of the absentee ballot is obviously discriminatory. The State offered no justification for the difference in treatment in the District Court, did not brief the issue here, and had little to say in oral argument to justify the discrimination.

We have twice since *McDonald* v. *Board of Election Comm'rs* dealt with alleged discriminations in the availability of the absentee ballot, *Goosby* v. *Osser,* 409 U. S. 512 (1973); *O'Brien* v. *Skinner,* 414 U. S. 524 (1974). From the latter case, it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause. Plainly, the District Court in this case employed an erroneous standard in judging the Texas absentee voting law as it was applied in this case. We therefore vacate the judgment of the District Court in No. 72–887 in this respect and remand the Socialist Workers Party case to the District Court for further consideration in light of *Goosby* v. *Osser* and *O'Brien* v. *Skinner.* In all other respects, that judgment is affirmed, as is the judgment in No. 72–942.

So ordered.

MR. JUSTICE DOUGLAS, dissenting in part.

While I agree with the Court on the absentee ballot aspect of these cases, I dissent on the main issue. These cases involve appeals from the dismissal of actions seeking declaratory and injunctive relief against provisions of the Texas Election Code relating to

minority parties and independent candidates. The District Court noted that:

> "While the Supreme Court of the United States has delineated on the extreme end of the spectrum those combinations of restrictions which unconstitutionally impede the election process [*Williams* v. *Rhodes*, 393 U. S. 23 (1968)], and those on the other end which do not [*Jenness* v. *Fortson*, 403 U. S. 431 (1971)], this case presents a new combination which falls squarely in the middle." *Raza Unida Party* v. *Bullock*, 349 F. Supp. 1272, 1275–1276 (WD Tex. 1972).

The hurdles facing minority parties such as the American Party of Texas in seeking to place nominees on the ballot are set out and compared with those of *Jenness* v. *Fortson*, 403 U. S. 431, in my opinion dissenting from the denial of a temporary restraining order in *American Party of Texas* v. *Bullock*, 409 U. S. 803.[1] I there noted that:

> "We said in *Jenness* v. *Fortson*, *supra*, at 438, 'Georgia's election laws, unlike Ohio's, do not operate to freeze the status quo.' Texas, though not as severe as Ohio, works in that direction. It therefore seems to me, at least prima facie, to impose an

[1] As I there noted, minority parties whose gubernatorial candidate in the last election polled more than 2% of the total votes cast but less than 200,000 were allowed to select candidates through either primaries or nominating conventions. Tex. Election Code, Art. 13.45 (1) (Supp. 1972). The law has since been changed so that a minority party which fielded a gubernatorial candidate who polled more than 2% of the vote in the last election may not select candidates through primaries but must nominate through conventions unless the gubernatorial candidate polled more than 20% of the vote. Texas S. B. No. 11, 63d Legislature, Regular Session, § 6 (1973), quoted in Supplemental Appendix to Brief for American Party of Texas 14–15.

invidious discrimination on the unorthodox political group.

"Perhaps full argument would dispel these doubts. But they are so strong that I would grant the requested stay . . . ." *Id.*, at 806.

Oral argument has failed to dispel the doubts. For the reasons stated in *American Party of Texas* v. *Bullock, supra,* I believe that the totality of the requirements imposed upon minority parties works an invidious and unconstitutional discrimination.

An analysis of the requirements imposed on independent candidates leads me to the same conclusion.[2] Under

[2] The requirements for independent candidates are set forth in Tex. Election Code, Art. 13.50 (1967):

"The name of a nonpartisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the proper officer, as herein provided, and delivered to him within thirty days after the second primary election day, as follows:

"If for an office to be voted for throughout the state, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of more than one county, the application shall be signed by three per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a district office in a district composed of only one county or part of one county, the application shall be signed by five per cent of the entire vote cast for Governor in such district at the last preceding general election, and shall be addressed to the Secretary of State.

"If for a county office, the application shall be signed by five per cent of the entire vote cast for Governor in such county at the last preceding general election, and shall be addressed to the county judge.

"If for a precinct office, the application shall be signed by five per cent of the entire vote cast for Governor in such precinct at the

the procedures reviewed in *Jenness*, independent candidates seeking a ballot position had six months to secure the signatures of 5% of the eligible electorate for the office in question. The percentage required in Texas ranges, according to the office, from 1% of the last statewide gubernatorial vote to 5% of the last local gubernatorial vote, and in any case no more than 500 signatures are required; the candidate, however, has only 30 days in which to gather them. In *Jenness* a voter could

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last preceding general election, and shall be addressed to the county judge.

"Notwithstanding the foregoing provisions, the number of signatures required on an application for any district, county, or precinct office need not exceed five hundred.

"No application shall contain the name of more than one candidate. No person shall sign the application of more than one candidate for the same office; and if any person signs the application of more than one candidate for the same office, the signature shall be void as to all such applications. No person shall sign such application unless he is a qualified voter, and no person who has voted at either the general primary election or the runoff primary election of any party shall sign an application in favor of anyone for an office for which a nomination was made at either such primary election.

"The application shall contain the following information with respect to each person signing it: his address and the number of his poll tax receipt or exemption certificate and the county of issuance; or if he is exempt from payment of a poll tax and not required to obtain an exemption certificate, the application shall so state.

"Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to the officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such withdrawal, the person shall be free to sign the application of another candidate for the same office. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 227; as amended Acts 1963, 58th Leg., p. 1017, ch. 424, § 104."

sign a candidate's petition even though he had already signed or would sign others. Here no voter may sign the application of more than one candidate. In *Jenness* a voter who signed the petition of an independent was free thereafter to participate in a party primary and a voter who previously voted in a party primary was fully eligible to sign a petition. Here independents are not even allowed to seek signatures until after the major party primaries, and no voter who has participated in a party primary is allowed to sign an independent candidate's application. In *Jenness* no signature on a nominating petition had to be notarized, but that is not the case here.

In *Jenness* we were able to say that Georgia "has insulated not a single potential voter from the appeal of new political voices within its borders." 403 U. S., at 442. In Texas, however, the independent, like the minority party, must "draw [his] support from the ranks of those who [are] either unwilling or unable to vote in the primaries of the established parties." *American Party of Texas* v. *Bullock*, 409 U. S., at 806. As with minority parties, I do not believe that Texas may constitutionally leave independent candidates to "be content with the left-overs to get on the ballot." *Ibid.*

UNITED STATES *v.* EDWARDS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73–88. Argued January 15, 1974—Decided March 26, 1974

Respondent Edwards was arrested shortly after 11 p. m. on May 31, 1970, and taken to jail. The next morning, a warrantless seizure was made of his clothing and over his objection at his later trial, which resulted in conviction, was used as evidence. The Court of Appeals reversed. Though conceding the legality of the arrest; that probable cause existed for believing that the clothing would reveal incriminating evidence; and that searches and seizures that could be made at the time of arrest may be legally conducted when the accused arrives at the place of detention, the court held that the warrantless seizure of Edwards' clothing "after the administrative process and the mechanics of the arrest [had] come to a halt," was unconstitutional. *Held:* The search and seizure of Edwards' clothing did not violate the Fourth Amendment. Pp. 802–809.

(a) At the time Edwards was placed in his cell, the normal processes incident to arrest and custody had not been completed, and the delay in seizing the clothing was not unreasonable, since at that late hour no substitute clothing was available, and when the next morning the police were able to supply substitute clothing and took Edwards' clothing for laboratory analysis, they did no more than they were entitled to do incident to the usual arrest and incarceration. Pp. 804–805.

(b) Once an accused has been lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of arrest may lawfully be searched and seized without a warrant even after a substantial time lapse between the arrest and later administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. Pp. 806–808.

474 F. 2d 1206, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEW-

ART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 809.

Edward R. Korman argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Jerome M. Feit.*

Thomas R. Smith, by appointment of the Court, 414 U. S. 1125, argued the cause and filed a brief for respondents.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is whether the Fourth Amendment should be extended to exclude from evidence certain clothing taken from respondent Edwards while he was in custody at the city jail approximately 10 hours after his arrest.

Shortly after 11 p. m. on May 31, 1970, respondent Edwards was lawfully arrested on the streets of Lebanon, Ohio, and charged with attempting to break into that city's Post Office.[1] He was taken to the local jail and placed in a cell. Contemporaneously or shortly thereafter, investigation at the scene revealed that the attempted entry had been made through a wooden window which apparently had been pried up with a pry bar, leaving paint chips on the window sill and wire mesh

**Frank G. Carrington, Jr., Wayne W. Schmidt, Fred E. Inbau, Glen Murphy, Paul Keller,* and *Courtney A. Evans* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

[1] Edwards (hereafter also referred to as respondent) had an alleged confederate, William T. Livesay, who was corespondent in this case, but died after the petition for certiorari was granted. We therefore vacate the judgment as to him and remand the case to the District Court with directions to dismiss the indictment. *Durham* v. *United States,* 401 U. S. 481 (1971).

screen. The next morning, trousers and a T-shirt were purchased for Edwards to substitute for the clothing which he had been wearing at the time of and since his arrest. His clothing was then taken from him and held as evidence. Examination of the clothing revealed paint chips matching the samples that had been taken from the window. This evidence and his clothing were received at trial over Edwards' objection that neither the clothing nor the results of its examination were admissible because the warrantless seizure of his clothing was invalid under the Fourth Amendment.

The Court of Appeals reversed. Expressly disagreeing with two other Courts of Appeals,[2] it held that although the arrest was lawful and probable cause existed to believe that paint chips would be discovered on respondent's clothing, the warrantless seizure of the clothing carried out "after the administrative process and the mechanics of the arrest have come to a halt" was nevertheless unconstitutional under the Fourth Amendment. 474 F. 2d 1206, 1211 (CA6 1973). We granted certiorari, 414 U. S. 818, and now conclude that the Fourth Amendment should not be extended to invalidate the search and seizure in the circumstances of this case.

The prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions. One of them permits warrantless searches incident to custodial arrests, *United States* v. *Robinson*, 414 U. S. 218 (1973); *Chimel* v. *California*, 395 U. S. 752, 755 (1969); *Weeks* v. *United States*, 232 U. S. 383, 392 (1914), and has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime

[2] The Court stated that it could not agree with *United States* v. *Williams*, 416 F. 2d 4 (CA5 1969), and *United States* v. *Caruso*, 358 F. 2d 184 (CA2), cert. denied, 385 U. S. 862 (1966).

when a person is taken into official custody and lawfully detained. *United States* v. *Robinson, supra.*[3]

It is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention. If need be, *Abel* v. *United States,* 362 U. S. 217 (1960), settled this question. There the defendant was arrested at his hotel, but the belongings taken with him to the place of detention were searched there. In sustaining the search, the Court noted that a valid search of the property could have been made at the place of arrest and perceived little difference

> "when the accused decides to take the property with him, for the search of it to occur instead at the first place of detention when the accused arrives there, especially as the search of property carried by an accused to the place of detention has additional justifications, similar to those which justify a search of the person of one who is arrested." *Id.,* at 239.

The courts of appeals have followed this same rule, holding that both the person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted in evidence.[4] Nor is there any doubt

[3] "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States* v. *Robinson, supra,* at 235.

[4] *United States* v. *Manar,* 454 F. 2d 342 (CA7 1971); *United States* v. *Gonzalez-Perez,* 426 F. 2d 1283 (CA5 1970); *United States* v.

that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial.[5]

Conceding all this, the Court of Appeals in this case nevertheless held that a warrant is required where the search occurs after the administrative mechanics of arrest have been completed and the prisoner is incarcerated. But even on these terms, it seems to us that the normal processes incident to arrest and custody had not been completed when Edwards was placed in his cell on the night of May 31. With or without probable cause, the authorities were entitled at that point not only to search Edwards' clothing but also to take it from him and keep it in official custody. There was testimony that this was the standard practice in this city.[6] The police

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DeLeo, 422 F. 2d 487 (CA1 1970); *United States* v. *Williams*, *supra*; *United States* v. *Miles*, 413 F. 2d 34 (CA3 1969); *Ray* v. *United States*, 412 F. 2d 1052 (CA9 1969); *Westover* v. *United States*, 394 F. 2d 164 (CA9 1968); *United States* v. *Frankenberry*, 387 F. 2d 337 (CA2 1967); *Evalt* v. *United States*, 382 F. 2d 424 (CA9 1967); *Malone* v. *Crouse*, 380 F. 2d 741 (CA10 1967); *Cotton* v. *United States*, 371 F. 2d 385 (CA9 1967); *Miller* v. *Eklund*, 364 F. 2d 976 (CA9 1966); *Hancock* v. *Nelson*, 363 F. 2d 249 (CA1 1966); *Golliher* v. *United States*, 362 F. 2d 594 (CA8 1966); *Rodgers* v. *United States*, 362 F. 2d 358 (CA8), cert. denied, 385 U. S. 993 (1966); *United States* v. *Caruso*, *supra*; *Whalem* v. *United States*, 120 U. S. App. D. C. 331, 346 F. 2d 812, cert. denied, 382 U. S. 862 (1965); *Grillo* v. *United States*, 336 F. 2d 211 (CA1 1964), cert. denied *sub nom. Gorin* v. *United States*, 379 U. S. 971 (1965); *Robinson* v. *United States*, 109 U. S. App. D. C. 22, 283 F. 2d 508 (1960); *Baskerville* v. *United States*, 227 F. 2d 454 (CA10 1955).

[5] See, *e. g.*, *United States* v. *Caruso*, *supra*; *United States* v. *Williams*, *supra*; *Golliher* v. *United States*, *supra*; *Whalem* v. *United States*, *supra*; *Robinson* v. *United States*, *supra*; *Evalt* v. *United States*, *supra*; *Hancock* v. *Nelson*, *supra*.

[6] App. 6. Historical evidence points to the established and routine custom of permitting a jailer to search the person who is

were also entitled to take from Edwards any evidence of the crime in his immediate possession, including his clothing. And the Court of Appeals acknowledged that contemporaneously with or shortly after the time Edwards went to his cell, the police had probable cause to believe that the articles of clothing he wore were themselves material evidence of the crime for which he had been arrested. 474 F. 2d, at 1210. But it was late at night; no substitute clothing was then available for Edwards to wear, and it would certainly have been unreasonable for the police to have stripped respondent of his clothing and left him exposed in his cell throughout the night. Cf. *United States* v. *Caruso,* 358 F. 2d 184, 185–186 (CA2), cert. denied, 385 U. S. 862 (1966). When the substitutes were purchased the next morning, the clothing he had been wearing at the time of arrest was taken from him and subjected to laboratory analysis. This was no more than taking from respondent the effects in his immediate possession that constituted evidence of crime. This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. The police did no more on June 1 than they were entitled to do incident to the usual custodial arrest and incarceration.

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being processed for confinement under his custody and control. See, *e. g.,* T. Gardner & V. Manian, Principles and Cases of the Law of Arrest, Search, and Seizure 200 (1974); E. Fisher, Search and Seizure 71 (1970). While "[a] rule of practice must not be allowed . . . to prevail over a constitutional right," *Gouled* v. *United States,* 255 U. S. 298, 313 (1921), little doubt has ever been expressed about the validity or reasonableness of such searches incident to incarceration. T. Taylor, Two Studies in Constitutional Interpretation 50 (1969).

Other closely related considerations sustain the examination of the clothing in this case. It must be remembered that on both May 31 and June 1 the police had lawful custody of Edwards and necessarily of the clothing he wore. When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered. *Chimel* v. *California,* 395 U. S. 752 (1969); *Frazier* v. *Cupp,* 394 U. S. 731 (1969); *Warden* v. *Hayden,* 387 U. S. 294 (1967); *Ker* v. *California,* 374 U. S. 23 (1963) (plurality opinion); *Zap* v. *United States,* 328 U. S. 624 (1946), vacated on other grounds, 330 U. S. 800 (1947). Surely, the clothes could have been brushed down and vacuumed while Edwards had them on in the cell, and it was similarly reasonable to take and examine them as the police did, particularly in view of the existence of probable cause linking the clothes to the crime. Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.

In *Cooper* v. *California,* 386 U. S. 58 (1967), an accused had been arrested for a narcotics offense and his automobile impounded preparatory to institution of forfeiture proceedings. The car was searched a week later without a warrant and evidence seized that was later introduced at the defendant's criminal trial. The warrantless search and seizure were sustained because they were "closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. . . . It would be unreasonable to hold that the police, having to retain the car in their

custody for such a length of time, had no right, even for their own protection, to search it." *Id.*, at 61–62. It was no answer to say that the police could have obtained a search warrant, for the Court held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable, which it was. *Id.*, at 62. *United States* v. *Caruso, supra,* expresses similar views. There, defendant's clothes were not taken until six hours after his arrival at a place of detention. The Court of Appeals properly held that no warrant was required:

> "He and his clothes were constantly in custody from the moment of his arrest, and the inspection of his clothes and the holding of them for use in evidence were, under the circumstances, reasonable and proper." 358 F. 2d, at 185 (citations omitted).

Caruso is typical of most cases in the courts of appeals that have long since concluded that once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the "property room" of the jail, and at a later time searched and taken for use at the subsequent criminal trial.[7] The result is the

[7] See *Evalt* v. *United States*, 382 F. 2d 424 (CA9 1967); *Westover* v. *United States*, 394 F. 2d 164 (CA9 1968); *Baskerville* v. *United States*, 227 F. 2d 454 (CA10 1955). In *Baskerville*, the effects were taken for safekeeping on December 23 but re-examined and taken

same where the property is not physically taken from the defendant until sometime after his incarceration.[8]

In upholding this search and seizure, we do not conclude that the Warrant Clause of the Fourth Amendment is never applicable to postarrest seizures of the effects of an arrestee.[9] But we do think that the Court of Appeals for the First Circuit captured the essence of situations like this when it said in *United States* v. *DeLeo*, 422 F. 2d 487, 493 (1970) (footnote omitted):

> "While the legal arrest of a person should not destroy the privacy of his premises, it does—for at

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as evidence on January 6. *Brett* v. *United States*, 412 F. 2d 401 (CA5 1969), is *contra*. There the defendant's clothes were taken from him shortly after arrival at the jail, as was the custom, and held in the property room of the jail. Three days later the clothing was searched and incriminating evidence found. A divided panel of the Court of Appeals held the evidence inadmissible for want of a warrant authorizing the search.

[8] *Hancock* v. *Nelson*, 363 F. 2d 249 (CA1 1966); *Malone* v. *Crouse*, 380 F. 2d 741 (CA10 1967); *United States* v. *Caruso*, 358 F. 2d 184 (CA2 1966). In *Hancock*, the defendant was first taken into custody at 12:51 a. m. His clothes were taken at 2 p. m. on the same day, two hours after probable cause to do so eventuated.

[9] Holding the Warrant Clause inapplicable in the circumstances present here does not leave law enforcement officials subject to no restraints. This type of police conduct "must [still] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). But the Court of Appeals here conceded that probable cause existed for the search and seizure of respondent's clothing, and respondent complains only that a warrant should have been secured. We thus have no occasion to express a view concerning those circumstances surrounding custodial searches incident to incarceration which might "violate the dictates of reason either because of their number or their manner of perpetration." *Charles* v. *United States*, 278 F. 2d 386, 389 (CA9), cert. denied, 364 U. S. 831 (1960). Cf. *Schmerber* v. *California*, 384 U. S. 757 (1966); *Rochin* v. *California*, 342 U. S. 165 (1952).

least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."

The judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

The Court says that the question before us "is whether the Fourth Amendment should be extended" to prohibit the warrantless seizure of Edwards' clothing. I think, on the contrary, that the real question in this case is whether the Fourth Amendment is to be ignored. For in my view the judgment of the Court of Appeals can be reversed only by disregarding established Fourth Amendment principles firmly embodied in many previous decisions of this Court.

As the Court has repeatedly emphasized in the past, "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Coolidge* v. *New Hampshire,* 403 U. S. 443, 454–455; *Katz* v. *United States,* 389 U. S. 347, 357. Since it is conceded here that the seizure of Edwards' clothing was not made pursuant to a warrant, the question becomes whether the Government has met its burden of showing that the circumstances of this seizure brought it within one of the "jealously and carefully drawn" [1] exceptions to the warrant requirement.

[1] *Jones* v. *United States,* 357 U. S. 493, 499.

The Court finds a warrant unnecessary in this case because of the custodial arrest of the respondent. It is, of course, well settled that the Fourth Amendment permits a warrantless search or seizure incident to a constitutionally valid custodial arrest. *United States* v. *Robinson*, 414 U. S. 218; *Chimel* v. *California*, 395 U. S. 752. But the mere fact of an arrest does not allow the police to engage in warrantless searches of unlimited geographic or temporal scope. Rather, the search must be spatially limited to the person of the arrestee and the area within his reach, *Chimel* v. *California*, *supra*, and must, as to time, be "substantially contemporaneous with the arrest," *Stoner* v. *California*, 376 U. S. 483, 486; *Preston* v. *United States*, 376 U. S. 364, 367–368.

Under the facts of this case, I am unable to agree with the Court's holding that the search was "incident" to Edwards' custodial arrest. The search here occurred fully 10 hours after he was arrested, at a time when the administrative processing and mechanics of arrest had long since come to an end. His clothes were not seized as part of an "inventory" of a prisoner's effects, nor were they taken pursuant to a routine exchange of civilian clothes for jail garb.[2] And the considerations that typically justify a warrantless search incident to a lawful arrest were wholly absent here. As Mr. Justice

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[2] The Government conceded at oral argument that the seizure of the respondent's clothing was not a matter of routine jail procedure, but was undertaken solely for the purpose of searching for the incriminating paint chips.

No contention is made that the warrantless seizure of the clothes was necessitated by the exigencies of maintaining discipline or security within the jail system. There is thus no occasion to consider the legitimacy of warrantless searches or seizures in a penal institution based upon that quite different rationale.

Black stated for a unanimous Court in *Preston* v. *United States, supra,* at 367:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." [3]

Accordingly, I see no justification for dispensing with the warrant requirement here. The police had ample time to seek a warrant, and no exigent circumstances were present to excuse their failure to do so. Unless the exceptions to the warrant requirement are to be "enthroned into the rule," *United States* v. *Rabinowitz,* 339 U. S. 56, 80 (Frankfurter, J., dissenting), this is precisely the sort of situation where the Fourth Amendment requires a magistrate's prior approval for a search.

The Court says that the relevant question is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable." *Ante,* at 807. Precisely such a view, however, was explicitly rejected in *Chimel* v. *California, supra,* at 764–765, where the Court characterized the argument as "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." As

[3] No claim is made that the police feared that Edwards either possessed a weapon or was planning to destroy the paint chips on his clothing. Indeed, the Government has not even suggested that he was aware of the presence of the paint chips on his clothing.

they were in *Chimel*, the words of Mr. Justice Frankfurter are again most relevant here:

> "To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response. There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant . . . ." *United States* v. *Rabinowitz*, *supra*, at 83 (dissenting opinion).

The intrusion here was hardly a shocking one, and it cannot be said that the police acted in bad faith. The Fourth Amendment, however, was not designed to apply only to situations where the intrusion is massive and the violation of privacy shockingly flagrant. Rather, as the Court's classic admonition in *Boyd* v. *United States*, 116 U. S. 616, 635, put the matter:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right,

> as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Because I believe that the Court today unjustifiably departs from well-settled constitutional principles, I respectfully dissent.

HUDDLESTON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–1076. Argued November 7, 1973—Decided March 26, 1974

Petitioner, a previously convicted felon, was convicted of violating 18 U. S. C. § 922 (a)(6), a part of the Gun Control Act of 1968, by falsely stating, in connection with the redemption from a pawnbroker of three guns petitioner had pawned, that he had not been convicted of a crime punishable by imprisonment for more than a year. The pawnbroker was a federally licensed firearms dealer. The Court of Appeals affirmed. Section 922 (a)(6) makes it an offense knowingly to make a false statement "in connection with the acquisition . . . of any firearm . . . from a . . . licensed dealer" and "intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale or other disposition of such firearm . . . ." *Held:* Section 922 (a)(6) applies to the redemption of a firearm from a pawnshop. Pp. 819–833.

(a) Petitioner's contention that the statute covers only a sale-like transaction is without merit, since "acquisition" as used in § 922 (a)(6) clearly includes any person, by definition, who "comes into possession, control, or power of disposal" of a firearm. Moreover, the statutory terms "acquisition" and "sale or other disposition" are correlatives. It is reasonable to conclude that a pawnbroker might "dispose" of a firearm through a redemptive transaction. Finally, Congress explicitly included pawnbrokers in the Gun Control Act, specifically mentioned pledge and pawn transactions involving firearms, and did not include them in the statutory exemptions. Pp. 819–823.

(b) That pawnshop firearms redemptions are covered by the challenged provision comports with the legislative history of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968, which are aimed at controlling access to weapons by those whose possession thereof is contrary to the public interest, through a regulatory scheme focusing on the federally licensed firearms dealer. Pp. 824–829.

(c) Section 922 (a)(6) contains no ambiguity warranting a narrow construction in petitioner's favor, and application of the

statute to the pawn redemptions here raises no issue of constitutional dimension. Pp. 830–833.

472 F. 2d 592, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 833.

Harvey I. Saferstein argued the cause and filed briefs for petitioner.

Danny J. Boggs argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Jerome M. Feit.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether 18 U. S. C. § 922 (a)(6),[1] declaring that it is unlawful knowingly to make a false statement "in connection with the acquisition . . . of any firearm . . . from a . . . licensed dealer," covers the redemption of a firearm from a pawnshop.

I

On October 6, 1971, petitioner, William C. Huddleston, Jr., pawned his wife's Winchester 30–30-caliber rifle for $25 at a pawnshop in Oxnard, California. On the following October 15 and on December 28, he pawned at

[1] "§ 922. Unlawful acts.

"(a) It shall be unlawful—

. . . . . .

"(6) for any person in connection with the acquisition . . . of any firearm . . . from a . . . licensed dealer . . . knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale or other disposition of such firearm . . . under the provisions of this chapter."

the same shop two other firearms, a Russian 7.62-caliber rifle and a Remington .22-caliber rifle, belonging to his wife. For these he received loans of $10 and $15, respectively. The owner of the pawnshop was a federally licensed firearms dealer.

Some weeks later, on February 1, 1972, and on March 10, Huddleston redeemed the weapons. In connection with each of the redemptions, the pawnbroker required petitioner to complete Treasury Form 4473, entitled "Firearms Transaction Record." This is a form used in the enforcement of the gun control provision of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 225, as amended by the Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213, of which the above-cited 18 U. S. C. § 922 (a)(6) is a part. Question 8b of the form is:

> "Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year.)"

The question is derived from the statutory prohibition against a dealer's selling or otherwise disposing of a firearm to any person who "has been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year." 18 U. S. C. § 922 (d)(1).[2] Petitioner answered "no" to Question 8b on each of the three

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[2] "§ 922. Unlawful acts.

. . . . . .

"(d) It shall be unlawful for any . . . licensed dealer . . . to sell or otherwise dispose of any firearm . . . to any person knowing or having reasonable cause to believe that such person—

"(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."

Forms 4473. He then affixed his signature to each form's certification that the answers were true and correct, that he understood that a person who answers any of the questions in the affirmative is prohibited by federal law from "purchasing and/or possessing a firearm," and that he also understood that the making of any false statement with respect to the transaction is a crime punishable as a felony.

In fact, Huddleston, six years earlier, had been convicted in a California state court for writing checks without sufficient funds, an offense punishable under California law by a maximum term of 14 years.[3] This fact, if revealed to the pawnshop proprietor, would have precluded the proprietor from selling or otherwise disposing of any of the rifles to the petitioner because of the proscription in 18 U. S. C. § 922 (d)(1).

Huddleston was charged in a three-count indictment with violating 18 U. S. C. §§ 922 (a)(6) and 924 (a).[4] He moved to dismiss the indictment, in part on the ground that § 922 (a)(6) was never intended to apply, and should not apply, to a pawnor's redemption of a weapon he had pawned. This motion was denied. Petitioner then pleaded not guilty and waived a jury trial.

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[3] Cal. Penal Code § 476a (1970). The California complaint against Huddleston was in six counts and contained an allegation that he had been convicted previously in the State of Iowa of an offense which, if committed in California, would have been a violation of § 476 of the California Penal Code. He was eventually sentenced on the check charge to 30 days in jail.

[4] "§ 924. Penalties.

"(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

The Government's evidence consisted primarily of the three Treasury Forms 4473 Huddleston had signed; the record of his earlier California felony conviction; and the pawnbroker's federal license. A Government agent also testified that petitioner, after being arrested and advised of his rights, made statements admitting that he had known, when filling out the forms, that he was a felon and that he had lied each time when he answered Question 8b in the negative.

Huddleston testified in his own defense. He stated that he did not knowingly make a false statement; that he did not read the form and simply answered "no" upon prompting from the pawnbroker; and that he was unaware that his California conviction was punishable by a term exceeding one year.[5]

The District Judge found the petitioner guilty on all counts. He sentenced Huddleston to three concurrent three-year terms. The sentences were suspended, however, except for 20 days to be served on weekends. The United States Court of Appeals for the Ninth Circuit, by a divided vote, affirmed the conviction. 472 F. 2d 592 (1973). The dissenting judge agreed that the statute was constitutional as applied, but concluded that what Huddleston did was to "reacquire" the rifles, and that "reacquire" is not necessarily included within the statute's term "acquire." *Id.*, at 593. We granted certiorari, 411 U. S. 930 (1973), to resolve an existing conflict among the circuits on the issue whether the

[5] Huddleston at first testified that his California attorney and his probation officer there told him that when he completed his probation period and made restitution, "it would go on record as a misdemeanor," and that the attorney had told him he "couldn't get over a year." App. 37, 39. Upon inquiry by the court, he testified that when he was arraigned he thought he "could get more than one year," and was so informed. *Id.*, at 41.

prohibition against making false statements in connection with the acquisition of a firearm covers a firearm's redemption from a pawnshop.[6]

II

Petitioner's assault on the statute under which he was convicted is two pronged. First, it is argued that both the statute's language and its legislative history indicate that Congress did not intend a pawnshop redemption of a firearm to be an "acquisition" covered by the statute. Second, it is said that even if Congress did intend a pawnshop redemption to be a covered "acquisition," the statute is so ambiguous that its construction is controlled by the maxim that ambiguity in a criminal statute is to be resolved in favor of the defendant.

We turn first to the language and structure of the Act. Reduced to a minimum, § 922 (a)(6) relates to any false statement made "in connection with the acquisition . . . of any firearm" from a licensed dealer and intended or likely to deceive the dealer "with respect to any fact material to the lawfulness of the sale or other disposition of such firearm."

Petitioner attaches great significance to the word "acquisition." He urges that it suggests only a sale-like transaction. Since Congress in § 922 (a)(6) did not use words of transfer or delivery, as it did in other sections of the Act, he argues that "acquisition" must have a narrower meaning than those terms. Moreover, since a pawn transaction is only a temporary bailment of personal property, with the pawnshop having merely a security interest in the pledged property, title or ownership is constant in the pawnor, and the pawn-

[6] In agreement with the Ninth Circuit's decision is *United States* v. *Beebe*, 467 F. 2d 222 (CA10 1972). To the contrary is *United States* v. *Laisure*, 460 F. 2d 709 (CA5 1972).

plus-redemption transaction is no more than an interruption in the pawnor's possession. The pawnor simply repossesses his own property, and he does not "acquire" any new title or interest in the object pawned. At most, he "reacquires" the object, and reacquisition, as the dissenting judge in the Court of Appeals noted, is not necessarily included in the statutory term "acquisition."

On its face, this argument might be said to have some force. A careful look at the statutory language and at complementary provisions of the Act, however, convinces us that the asserted ambiguity is contrived. Petitioner is mistaken in focusing solely on the term "acquisition" and in enshrouding it with an extra-statutory "legal title" or "ownership" analysis. The word "acquire" is defined to mean simply "to come into possession, control, or power of disposal of." Webster's New International Dictionary (3d ed., 1966, unabridged); *United States* v. *Laisure,* 460 F. 2d 709, 712 n. 3 (CA5 1972). There is no intimation here that title or ownership would be necessary for possession, or control, or disposal power, and there is nothing else in the statute that justifies the imposition of that gloss. Moreover, a full reading of § 922 (a)(6) clearly demonstrates that the false statements that are prohibited are those made with respect to the lawfulness of the sale "or other disposition" of a firearm by a licensed dealer. The word "acquisition," therefore, cannot be considered apart from the phrase "sale or other disposition." As the Government suggests, and indeed as the petitioner implicitly reasoned at oral argument, Tr. of Oral Arg. 11, if the pawnbroker "sells" or "disposes" under § 922 (a)(6), the transferee necessarily "acquires." These words, as used in the statute, are correlatives. The focus of our inquiry, therefore, should be to determine whether a "sale or other disposition" of a firearm by a pawnbroker encompasses the redemption of the firearm by a pawnor.

Clearly, a redemption is not a "sale" for the simple reason that a sale has definite connotations of ownership and title. Some "other disposition" of a firearm, however, could easily encompass a pawnshop redemption. We believe that it does.

It is the dealer who sells or disposes of the firearm. The statute defines the dealer to be:

> "(A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) *any person who is a pawnbroker.*" 18 U. S. C. § 921 (a)(11) (emphasis supplied).

It defines a "pawnbroker" as "any person whose business or occupation includes the taking or receiving, *by way of pledge or pawn,* of any firearm or ammunition as security for the payment or repayment of money." 18 U. S. C. § 921 (a)(12) (emphasis supplied).

These definitions surely suggest that a "sale or other disposition" of a firearm in a pawnshop is covered by the statute. This, of course, does not of itself resolve the question as to exactly what "other disposition" by a pawnbroker is included. It should be apparent, however, that if Congress had intended to include only a pawnbroker's default sales of pledged or pawned goods, or his wholesale and retail sales of nonpawned goods, and to exclude the *redemption* of pawned articles, then the explicit inclusion of the pawnbroker in the definition of "dealer" would serve no purpose, since part (A) of the definition, covering wholesale and retail sales, would otherwise reach all such sales. *United States* v. *Rosen,* 352 F. Supp. 727, 729 (Idaho 1973). At oral argument counsel suggested that the specific reference to a pawnbroker might have been intended to include "disposition"

by barter, swap, trade, or gift. Tr. of Oral Arg. 5–7. This interpretation strains belief. Trades or gifts are not peculiar to pawnbrokers. Wholesalers and retailers may indulge in such dispositions. There is nothing in the legislative history to indicate that this interpretation prompted the specific mention of a pawnbroker in part (C) of the definition. To the contrary, the committee reports indicate that part (C) "specifically provides that a pawnbroker *dealing in firearms* shall be considered a dealer." H. R. Rep. No. 1577, 90th Cong., 2d Sess., 11 (1968) (emphasis supplied). See also S. Rep. No. 1501, 90th Cong., 2d Sess., 30 (1968).

We also cannot ignore the explicit reference to a firearm transaction "by way of pledge or pawn" in the statutory definition of "pawnbroker" in § 921 (a)(12). Had Congress' desire been to exempt a transaction of this kind, it would have artfully worded the definition so as to exclude it. We are equally impressed by Congress' failure to exempt redemptive transactions from the prohibitions of the Act when it so carefully carved out exceptions for a dealer "returning a firearm" and for an individual mailing a firearm to a dealer "for the sole purpose of repair or customizing." § 922 (a)(2)(A). Petitioner contends that a redemptive transaction is no different from the return of a gun left for repair. His argument is that the pawned weapon is simply "returned" to the individual who left it and represents a mere restoration to its original status. We believe, however, that it was not unreasonable for Congress to choose to view the pawn transaction as something more than the mere interruption in possession typical of repair. The fact that Congress thought it necessary specifically to exempt the repair transaction indicates that it otherwise would have been covered and, if this were so, clearly a pawn transaction likewise would be covered.

Other provisions of the Act also make it clear that the statute generally covers all transfers of firearms by dealers to recipients. Section 922 (a)(1) makes it unlawful for any person, except a licensed importer, manufacturer, or dealer, to engage in the business of "dealing" in firearms, or in the course of such business "to ship, transport, or receive any firearm." Section 922 (b)(1) makes it unlawful for a dealer "to sell or deliver" firearms of specified types to persons under 18 or 21 years of age. Section 922 (b)(2) makes it unlawful for a dealer to "sell or deliver" a weapon to a person in any State where "at the place of sale, delivery or other disposition," the transfer would violate local law. Section 922 (d) makes it unlawful for a dealer "to sell or otherwise dispose of" a firearm to a person under a felony indictment, a felon, a fugitive, a narcotic addict, or a mental defective. Section 923 (g) requires that each licensed dealer maintain "records of importation, production, shipment, receipt, sale, or other disposition, of firearms."

In sum, the word "acquisition," as used in § 922 (a)(6), is not ambiguous, but clearly includes any person, by definition, who "come[s] into possession, control, or power of disposal" of a firearm. As noted above, "acquisition" and "sale or other disposition" are correlatives. It is reasonable to conclude that a pawnbroker might "dispose" of a firearm through a redemptive transaction. And because Congress explicitly included pawnbrokers in the Act, explicitly mentioned pledge and pawn transactions involving firearms, and clearly failed to include them among the statutory exceptions, we are not at liberty to tamper with the obvious reach of the statute in proscribing the conduct in which the petitioner engaged.

III

The legislative history, too, supports this reading of the statute. This is apparent from the aims and purposes of the Act and from the method Congress adopted to achieve those objectives. When Congress enacted the provisions under which petitioner was convicted, it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest. Pub. L. 90–351, § 1201, 82 Stat. 236, as amended by Pub. L. 90–618, § 301 (a)(1), 82 Stat. 1236, 18 U. S. C. App. § 1201. Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States. S. Rep. No. 1097, 90th Cong., 2d Sess., 108 (1968). The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968).

Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968 are thus aimed at restricting public access to firearms. Commerce in firearms is channeled through federally licensed importers, manufacturers, and dealers in an attempt to halt mail-order and interstate consumer traffic in these weapons. The principal agent of federal enforcement is the dealer. He is licensed, §§ 922 (a)(1) and 923 (a); he is required to keep records of "sale . . . or other disposition," § 923 (g); and he is subject to a criminal penalty for disposing of a weapon contrary to the provisions of the Act, § 924.

Section 922 (a)(6), the provision under which peti-

tioner was convicted, was enacted as a means of providing adequate and truthful information about firearms transactions. Information drawn from records kept by dealers was a prime guarantee of the Act's effectiveness in keeping "these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow." 114 Cong. Rec. 13219 (1968) (remarks of Sen. Tydings). Thus, any false statement with respect to the eligibility of a person to obtain a firearm from a licensed dealer was made subject to a criminal penalty.

From this outline of the Act, it is apparent that the focus of the federal scheme is the federally licensed firearms dealer, at least insofar as the Act directly controls access to weapons by users. Firearms are channeled through dealers to eliminate the mail order and the generally widespread commerce in them, and to insure that, in the course of sales or other dispositions by these dealers, weapons could not be obtained by individuals whose possession of them would be contrary to the public interest. Thus, the conclusion we reached above with respect to the language and structure of the Act, that firearms redemptions in pawnshops are covered, is entirely consonant with the achievement of this congressional objective and method of enforcing the Act.

Moreover, as was said in *United States* v. *Bramblett*, 348 U. S. 503, 507 (1955), "There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted" (footnotes omitted). Indeed, the committee reports indicate that the proscription under § 922 (d) on the sale or other disposition of a firearm to a felon "goes to all types of sales or dispositions—

over-the-counter as well as mail order." [7] S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968). See S. Rep. No. 1501, 90th Cong., 2d Sess., 34 (1968). As far as the parties have informed us, and as far as our independent research has revealed, there is no discussion of the actual meaning of "acquisition" or of "sale or other disposition" in the legislative history. Previous legislation relating to the particular term "other disposition" sheds some light, however, and prudence calls on us to look to it in ascertaining the legislative purpose. *United States* v. *Katz*, 271 U. S. 354, 357 (1926). The term apparently had its origin in § 1 (k) of the National Firearms Act, Pub. L. 474, 48 Stat. 1236 (1934). That Act set certain conditions on the "transfer" of machine guns and other dangerous weapons. As defined by the Act, "transfer" meant "to sell, assign, pledge, lease, loan, give away, or otherwise dispose of." The term "otherwise dispose of" in that context was aimed at providing

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[7] James V. Bennett, then Director of the Federal Bureau of Prisons, in Senate testimony offered a "case study" vividly illustrating non-sale situations that would qualify as a firearms "disposition" or "acquisition." One of his illustrations was the following:

"On September 26, 1958, a 20-year-old youth shot and seriously wounded a teller during the course of a bank robbery in St. Paul; only a week previously he had bought the revolver, a .357 Smith & Wesson, in a Minneapolis sporting goods store, pawned it the same day, and on the day of the robbery redeemed it with money obtained from check forgeries."

Mr. Bennett concluded his testimony with the observation, "No responsible and thoughtful citizen can, in my opinion, seriously object to measures which would discourage youngsters, the mentally ill, and criminals from coming into possession of handguns." Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., pt. 14, pp. 3369, 3377 (1963).

maximum coverage. The interpretation we adopt here accomplishes the same objective.[8]

There also can be no doubt of Congress' intention to deprive the juvenile, the mentally incompetent, the criminal, and the fugitive of the use of firearms. Senator Tydings stated:

> "Title IV, the concealed weapons amendment, is a very limited, stripped-down, bare-minimum gun-traffic control bill, primarily designed to reduce access to handguns for criminals, juveniles, and fugitives . . . . I can fairly say that this concealed weapons amendment does not significantly inconvenience hunters and sportsmen in any way. The people it does frustrate are the juveniles, felons, and fugitives who today can, with total anonymity and impunity, obtain guns by mail or by crossing into neighboring States with lax or no gun laws at all, regardless of the law of their own State." 114 Cong. Rec. 13647 (1968).

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[8] Testimony by then Attorney General Ramsey Clark also supports the rejection of petitioner's suggestion that the language of the statute be given a restrictive meaning:

"Mr. Donohue. Do you not think, Mr. Attorney General, to attain the real objective and purpose of this bill, it should not only deal with the sale, but whoever sells or delivers?

"Mr. Clark. It covers delivery, too.

"Mr. Donohue. Where?

"Mr. Clark. Well, generally, through the bill when you talk about—well, it would be unlawful for any licensed importer to sell or deliver. Any licensed dealer to sell or deliver.

"Mr. Donohue. It is not restricted to just sale for consideration?

"Mr. Clark. No. The delivery, too."

Hearings on an Anti-Crime Program before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 260 (1967).

Congressman Celler, the House Manager, stated:

> "Mr. Chairman, none of us who support Federal firearms controls believe that any bill or any system of control can guarantee that society will be safe from firearms misuse. But we are convinced that a strengthened system can significantly contribute to reducing the danger of crime in the United States. No one can dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons." *Id.*, at 21784.

Congressman McCulloch, a senior member of the House Committee on the Judiciary, in referring specifically to § 922 (a)(6), stated, "[The bill] makes it unlawful . . . [f]or any person, in connection with obtaining a firearm or ammunition from a licensee, to make a false representation material to such acquisition." *Id.*, at 21789.[9] Given these statements of congressional purpose, it would be unwarranted to except pawnship redemptions

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[9] It should be apparent from these statements that Congress was not so much concerned with guaranteeing no interference with the ownership of weapons as it was in distinguishing between law-abiding citizens and those whose possession of weapons would be contrary to the public interest. Hunting, target practice, gun collecting, and the legitimate use of guns for individual protection are not proscribed by the Act. Ownership of a weapon, however, may be interfered with by seizure and forfeiture under the Act for any violation of its provisions. Section 924 (d) incorporates the seizure and forfeiture provisions of the Internal Revenue Code when there is any violation of the provisions of the chapter or any rule or regulation thereunder. The Act itself thus contemplates interference with the ownership of weapons when those weapons fall into the hands of juveniles, criminals, drug addicts, and mental incompetents.

when, by virtue of the statutory language itself, such redemptions would be covered. Otherwise every evil Congress hoped to cure would continue unabated.[10]

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[10] What few references there are to pawnbrokers in the debates indicate that Congress was definitely interested in curbing firearms traffic between pawnbrokers and convicted felons. Senator Tydings, a strong proponent of the bill which became the Act, expressed his concern when he compared the bill to a proposal that was offered as an alternative:

"[O]ne reading through the amendment for the first time would assume that pawnbrokers are covered by the critically important provisions of the affidavit-waiting period procedure. But, if a pawnbroker only receives secondhand weapons as security for the repayment of a loan and does not deal in new firearms, he is not transporting, shipping, or receiving a firearm in interstate or foreign commerce. Used weapons presumably will have come to rest in the hands of the borrower, and the transaction will be wholly intrastate. Such a pawnbroker would not need a Federal firearms license to conduct over-the-counter transactions in firearms. And, accordingly, he would not be a 'licensed dealer' required to comply with the affidavit-waiting period procedure for his over-the-counter sales in handguns. Now, if this analysis is correct, and I believe it is, this is no small omission. Surely the great bulk of criminally irresponsible purchasers of pistols and revolvers buy their weapons secondhand, and many of them from pawnshops. We all have seen the virtual arsenals displayed in the windows of pawnshop dealers in all of the major cities of the country. To say that we have effectively regulated traffic in firearms when we will not have touched the great bulk of these pawnbroker operations is a complete and utter hypocrisy." 114 Cong. Rec. 13222 (1968).

See also Memorandum placed in the record by Senator Dodd. *Id.*, at 13320. Senator Tydings made this further comparison:

"[I]t is obvious that many persons with criminal records purchase from pawnbrokers, and there are many occasions when the pawnbroker knows the criminal background of the client. Under Amendment No. 708, many of these pawnbrokers will not be required to be licensed. They would not need to comply with the affidavit procedure. And even if they were licensed, there would be no prohibition on their selling firearms to known criminals. Under

IV

Petitioner urges that the intention to include pawn redemptions is so ambiguous and uncertain that the statute should be narrowly construed in his favor. Reliance is placed upon the maxim that an "ambiguity

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title IV, on the other hand, all of these pawnbrokers would be required to be licensed—because all dealers and manufacturers must be licensed whether or not they ship, receive, or transport in commerce—and all of them would be under direct Federal sanction not to sell firearms to known criminals. I ask you, which bill is likely to be more effective?" *Id.*, at 13223.

It must be conceded that these remarks refer to "selling" firearms, but we do not credit this fact as significant for purposes of determining whether a pawnshop redemption is covered by the Act. The plain language of the statute as enacted prohibits a dealer from "selling or disposing of" firearms to felons, and petitioner's counsel at oral argument intimated that a pawnbroker, under this language, could dispose of a firearm other than by sale and be covered by the Act. Tr. of Oral Arg. 4–5. References in the legislative debate, moreover, are replete with shorthand language and this is merely an instance of its use. Had the legislators been engaged in a colloquy on the actual meaning of "sale or other disposition of," we might be more receptive to the interpretation proffered by the petitioner.

We also note that the President of the Pawnbrokers' Association of the City of New York testified during congressional hearings that almost all firearm transactions by pawnshops are by pledge and redemption, and contended, therefore, that pawnbrokers should not be included as dealers under the Act. Hearings on a Federal Firearms Act before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 1062–1065 (1967). Thus, informed of the fact that almost all firearms transactions by pawnbrokers were through pledge and redemption, and faced with the argument that pawnbrokers should not be considered as "dealers," Congress clearly chose to retain pawnbrokers as firearms dealers.

Finally, the language of the committee reports indicates that a "sale or disposition" includes "all types of sales or dispositions." S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968).

concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U. S. 808, 812 (1971); *United States* v. *Bass*, 404 U. S. 336, 347 (1971). This rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property. *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820); *United States* v. *Bass*, 404 U. S., at 348. The rule is also the product of an awareness that legislators and not the courts should define criminal activity. Zeal in forwarding these laudable policies, however, must not be permitted to shadow the understanding that "[s]ound rules of statutory interpretation exist to discover and not to direct the Congressional will." *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 542 (1943). Although penal laws are to be construed strictly, they "ought not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Co.* v. *United States*, 2 Pet. 358, 367 (1829); *United States* v. *Wiltberger*, *supra*; *United States* v. *Morris*, 14 Pet. 464, 475 (1840); *United States* v. *Lacher*, 134 U. S. 624 (1890); *United States* v. *Bramblett*, 348 U. S., at 510; *United States* v. *Bass*, 404 U. S., at 351.

We perceive no grievous ambiguity or uncertainty in the language and structure of the Act. The statute in question clearly proscribes petitioner's conduct and accorded him fair warning of the sanctions the law placed on that conduct. Huddleston was not short of notice that his actions were unlawful. The question he answered untruthfully was preceded by a warning in boldface type that "an untruthful answer may subject you to criminal prosecution." The question itself was forthright and direct, stating that it was concerned with conviction of a crime punishable by imprisonment for a

term exceeding one year and that this meant the term which could have been imposed and not the sentence actually given. Finally, petitioner was required to certify by his signature that his answers were true and correct and that he understood that "the making of any false oral or written statement . . . with respect to this transaction is a crime punishable as a felony." This warning also was in boldface type. Clearly, petitioner had adequate notice and warning of the consequences of his action.

Our reading of the statute cannot be viewed as judicial usurpation of the legislative function. The statute's language reveals an unmistakable attempt to include pawnshop transactions, by pledge or pawn, among the transactions covered by the Act. And Congress unquestionably made it unlawful for dealers, including pawnbrokers, "to sell or otherwise dispose of any firearm" to a convicted felon, a juvenile, a drug addict, or a mental defective. § 922 (d). Under these circumstances we will not blindly incant the rule of lenity to "destroy the spirit and force of the law which the legislature intended to [and did] enact." *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 293 (1907); *United States* v. *Katz*, 271 U. S., at 357.[11]

[11] The decision today does not ignore the admonition of the Court in *United States* v. *Bass*, 404 U. S. 336, 349 (1971), that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." This statute did affect the federal balance and it did so intentionally. As Senator Tydings explained:

"This concealed weapons amendment does not violate any State's right to make its own gun laws. Quite the contrary, title IV provides the controls on interstate gun traffic which only the Federal Government can apply, and without which no State gun law is worth the paper it is written on. . . . Without such Federal assistance,

V

The petitioner suggests, lastly, that the application of § 922 (a)(6) to a pawn redemption would raise constitutional questions of some moment, and that these would not arise if the statute were narrowly construed. We fail to see the presence of issues of that import. There was no taking of Huddleston's property without just compensation. The rifles, in fact, were not his but his wife's. Moreover, Congress has determined that a convicted felon may not lawfully obtain weapons of that kind. Nor were petitioner's false answers in any way coerced. *United States* v. *Knox,* 396 U. S. 77, 79 (1969); *Bryson* v. *United States,* 396 U. S. 64, 72 (1969). Finally, no interstate commerce nexus need be demonstrated. Congress intended, and properly so, that §§ 922 (a)(6) and (d)(1), in contrast to 18 U. S. C. App. § 1202 (a)(1), see *United States* v. *Bass, supra,* were to reach transactions that are wholly intrastate, as the Court of Appeals correctly reasoned, "on the theory that such transactions affect interstate commerce." 472 F. 2d, at 593. See also *United States* v. *Menna,* 451 F. 2d 982, 984 (CA9 1971), cert. denied, 405 U. S. 963 (1972), and *United States* v. *O'Neill,* 467 F. 2d 1372, 1373–1374 (CA2 1972).

We affirm the judgment of the Court of Appeals.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

This case presents a minor version of the problem confronting the Court in *Rosenberg* v. *United States,* 346 U. S. 273. That case involved an ambiguity in a criminal law, an ambiguity that normally would be resolved

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any State gun law can be subverted by any child, fugitive, or felon who orders a gun by mail or buys one in a neighboring State which has lax gun laws." 114 Cong. Rec. 13647 (1968).

in favor of life. A split Court in a tense period of American history unhappily resolved the ambiguity against life—a break with history which the conscience of our people will sometime rectify.

The present case is a minor species of the same genus. A person who took his gun to a pawnshop for a loan undoubtedly had "acquired" the gun prior to that time. It is therefore odd to think of the "acquisition" occurring when he redeemed his own gun from the pawnshop. I agree with the Court of Appeals for the Fifth Circuit, *United States* v. *Laisure*, 460 F. 2d 709, that the ambiguity should be resolved in favor of the accused. That is what we have quite consistently done, except in *Rosenberg*, in the past. See *United States* v. *Bass*, 404 U. S. 336, 347–348, and cases cited.*

*Civil cases cited by the Court, *e. g. American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 293, are wide of the mark. For application of a law that sends people to prison for years where Congress has not made it clear they should be there, *United States* v. *Bass*, *supra*, at 346, is only another device as lacking in due process as Caligula's practice of printing the laws in small print and placing them so high on a wall that the ordinary man did not receive fair warning.

"When taxes of this kind had been proclaimed, but not published in writing, inasmuch as many offenses were committed through ignorance of the letter of the law, he at last, on the urgent demand of the people, had the law posted up, but in a very narrow place and in excessively small letters, to prevent the making of a copy." Suetonius, The Lives of the Twelve Caesars 192 (Modern Lib. ed. 1931).

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 834 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM FEBRUARY 4 THROUGH MARCH 25, 1974

FEBRUARY 4, 1974

Dismissal Under Rule 60

No. 73–532. AMERICAN POSTAL WORKERS UNION, AFL–CIO, DETROIT LOCAL *v.* INDEPENDENT POSTAL SYSTEM OF AMERICA, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1110.] Writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 481 F. 2d 90.

FEBRUARY 6, 1974

Dismissal Under Rule 60

No. 73–1053. SEABOARD COAST LINE RAILROAD CO. *v.* INTERNATIONAL MINERALS & CHEMICAL CORP. Sup. Ct. Fla. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 283 So. 2d 45.

FEBRUARY 7, 1974

Dismissal Under Rule 60

No. 73–6105. SHADD *v.* UNITED STATES. C. A. 3d Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 487 F. 2d 1395.

Miscellaneous Order

No. A–734. BRISCOE, GOVERNOR OF TEXAS, ET AL. *v.* GRAVES ET AL. D. C. W. D. Tex. Motions to vacate stay heretofore granted by MR. JUSTICE POWELL denied. MR. JUSTICE DOUGLAS dissents.

FEBRUARY 11, 1974

Dismissal Under Rule 60

No. 73–576. CYZEWSKI, AKA SCALZI, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 484 F. 2d 509.

FEBRUARY 19, 1974

Dismissal Under Rule 60

No. 73–297. ALLIANCE FOR CONSUMER PROTECTION, HILL DISTRICT BRANCH, ET AL. *v.* MILK MARKETING BOARD OF PENNSYLVANIA ET AL. Pa. Commw. Ct. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 7 Pa. Commw. 180, 299 A. 2d 197.

Affirmed on Appeal

No. 73–812. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. M. D. Pa.

No. 73–961. WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* SIMS ET AL. Affirmed on appeal from D. C. M. D. Ala. Reported below: 365 F. Supp. 215.

Appeals Dismissed

No. 73–766. LEDFORD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–897. PHELPS *v.* COVEY, REFEREE IN BANKRUPTCY. Appeal from C. A. 7th Cir. dismissed for want of substantial federal question.

No. 73–940. BOGART *v.* STATE BAR OF CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 9 Cal. 3d 743, 511 P. 2d 1167.

No. 73–956. PITTSBURGH COAL CO., DIVISION OF CONSOLIDATION COAL CO. *v.* PENNSYLVANIA; and

No. 73–957. HARMAR COAL CO. *v.* PENNSYLVANIA. Appeals from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 452 Pa. 77, 306 A. 2d 308.

No. 73–993. PHELPS *v.* COMMISSIONERS OF THE SUPREME COURT OF ILLINOIS ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 55 Ill. 2d 319, 303 N. E. 2d 13.

No. 73–5879. CALAWAY *v.* WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question.

No. 73–5705. DUN LEAVAY *v.* TENNEY, U. S. DISTRICT JUDGE, ET AL. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction.

No. 73–6004. ABERCROMBIE *v.* OHIO. Appeal from Ct. App. Ohio, Clermont County, dismissed for want of substantial federal question.

No. 73–929. DEL PASO RECREATION AND PARK DISTRICT ET AL. *v.* BOARD OF SUPERVISORS OF THE COUNTY OF SACRAMENTO ET AL. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 33 Cal. App. 3d 483, 109 Cal. Rptr. 169.

No. 73–951. WEBB *v.* NOLAN. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the

papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 484 F. 2d 1049.

No. 73–1005. Ross *v.* OHIO. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 36 Ohio App. 2d 185, 304 N. E. 2d 396.

No. 73–1007. FRANKLIN ET AL. *v.* KRAUSE, CLERK, BOARD OF SUPERVISORS OF NASSAU COUNTY. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 32 N. Y. 2d 234, 298 N. E. 2d 68, and 33 N. Y. 2d 646, 303 N. E. 2d 71.

Vacated and Remanded on Appeal

No. 73–232. EXXON CORP. *v.* PRESTON. Appeal from Ct. Civ. App. Tex., 9th Sup. Jud. Dist. [Probable jurisdiction noted, 414 U. S. 1038.] Upon receiving and filing appellee's waiver of his right to file an opposing brief with his representation that he no longer opposes change of venue of the litigation to Harris County, Texas, judgment of the Court of Civil Appeals of Texas, Ninth Supreme Judicial District, is vacated and case remanded to that court to consider whether venue issue has become moot. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 487 S. W. 2d 956.

Certiorari Granted—Vacated and Remanded

No. 73–285. NOREIKIS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Upon representation of the Solicitor General as set forth in his memorandum for the United

States filed January 30, 1974, certiorari as to petitioner George Hibma granted, judgment vacated, and case remanded to the United States District Court for the Northern District of Illinois for reconsideration in light of position presently asserted by the Government. Certiorari denied as to Robert A. Noreikis and Robert Rothrock. Reported below: 481 F. 2d 1177.

Certiorari Granted—Reversed. (See No. 73–347, *ante*, p. 125.)

Miscellaneous Orders

No. 52, Orig. UNITED STATES *v.* FLORIDA. Report of Special Master received and ordered filed. Exceptions, if any, may be filed by the parties within 45 days. Reply briefs, if any, may be filed within 30 days thereafter. [For earlier orders herein, see, *e. g.*, 404 U. S. 998.]

No. A–664. GELLIS *v.* CITY OF SAVANNAH ET AL. Application for vacation of order of United States District Court for the Southern District of Georgia (Civil Action No. 3031) dated January 7, 1974, dismissing case for lack of prosecution, denied. Application for stay heretofore denied by MR. JUSTICE POWELL, now presented to THE CHIEF JUSTICE and by him referred to the Court, denied.

No. A–712. NEW YORK ON BEHALF OF NEW YORK COUNTY ET AL. *v.* UNITED STATES ET AL. Application for stay of order of the United States District Court for the District of Columbia, dated January 10, 1974, presented to THE CHIEF JUSTICE and by him referred to the Court, denied.

No. A–742. HARRIS COUNTY COMMISSIONERS COURT ET AL. *v.* MOORE ET AL. D. C. S. D. Tex. Motion of respondents to vacate stay order heretofore granted by MR. JUSTICE POWELL on February 4, 1974, denied. MR. JUSTICE DOUGLAS would vacate the stay.

No. A–752. BROBECK *v.* UNITED STATES ET AL. C. A. 3d Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–760. ACKERMAN ET AL. *v.* BOGUE, U. S. DISTRICT JUDGE. C. A. 8th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. D–14. IN RE DISBARMENT OF MACLEOD. Motion to vacate order of disbarment of this Court dated January 21, 1974 [414 U. S. 1153], denied.

No. D–17. IN RE DISBARMENT OF ENGLERT. It having been reported to the Court that Charles E. Englert, of Boston, Massachusetts, has been disbarred from the practice of law in all of the courts of Massachusetts, and this Court by order of November 12, 1973 [414 U. S. 1020], having suspended the said Charles E. Englert from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return has expired;

It is ordered that the said Charles E. Englert be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–19. IN RE DISBARMENT OF MCWHINNEY. It having been reported to this Court that Robert R. McWhinney of Greensburg, Pennsylvania, has been disbarred from the practice of law in all of the courts of Pennsylvania, and this Court by order of November 19, 1973 [414 U. S. 1036], having suspended the said Robert R. McWhinney from practice of law in this Court and

directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return has expired;

It is ordered that the said Robert R. McWhinney be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–22. IN RE DISBARMENT OF ROSNER. It is ordered that Edmund Allen Rosner of New York, New York, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 72–1490. FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL.; and

No. 72–1491. DOUGHERTY, EXECUTOR, ET AL. *v.* TEXACO INC. ET AL. C. A. D. C. Cir. [Certiorari granted, 414 U. S. 817.] Motion of the Solicitor General for divided argument granted.

No. 72–1513. SHEA, EXECUTIVE DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF COLORADO, ET AL. *v.* VIALPANDO. C. A. 10th Cir. [Certiorari granted, 414 U. S. 999.] Motion of petitioners for divided argument granted.

No. 72–1597. BEASLEY ET AL. *v.* FOOD FAIR OF NORTH CAROLINA, INC., ET AL. Sup. Ct. N. C. [Certiorari granted, 414 U. S. 907.] Motion of Associated Industries, Inc., et al., for leave to participate in oral argument as *amici curiae* denied.

No. 72–1690. SPENCE *v.* WASHINGTON. Appeal from Sup. Ct. Wash. [Probable jurisdiction noted, 414 U. S.

815.] Motion of appellant for leave to file supplemental brief, after argument, granted.

No. 73–206. PARKER, WARDEN, ET AL. *v.* LEVY. Appeal from C. A. 3d Cir. [Probable jurisdiction postponed, 414 U. S. 973.] Motion of Richard G. Augenblick for leave to file a brief as *amicus curiae* granted.

No. 73–235. DEFUNIS ET AL. *v.* ODEGAARD ET AL. Sup. Ct. Wash. [Certiorari granted, 414 U. S. 1038.] Motions of Anti-Defamation League of the B'nai B'rith and National Council of Jewish Women et al. for leave to participate in oral argument as *amici curiae* denied. Motions of Equal Employment Opportunity Commission, Chamber of Commerce of the United States, and American Bar Assn. for leave to file briefs as *amici curiae* granted. Motion of International Association of Official Human Rights Agencies for leave to adopt the *amicus curiae* brief of the State of Ohio denied.

No. 73–300. SAXBE, ATTORNEY GENERAL, ET AL. *v.* BUSTOS ET AL.; and

No. 73–480. CARDONA *v.* SAXBE, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. [Certiorari granted, 414 U. S. 1143.] Motion of the Solicitor General to waive printing of appendix and to proceed on original record granted.

No. 73–347. PHILLIPS PETROLEUM CO. *v.* TEXACO INC. C. A. 10th Cir. Motion of Northern Natural Gas Co. et al. for leave to file a brief as *amicus curiae* denied.

No. 73–477. GERSTEIN *v.* PUGH ET AL. C. A. 5th Cir. [Certiorari granted, 414 U. S. 1062.] Motion of the Attorney General of Florida for leave to participate in oral argument as *amicus curiae* granted and a total of 15 minutes allotted for that purpose. Respondents allotted an additional 15 minutes for oral argument.

No. 73–434. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.;

No. 73–435. ALLEN PARK PUBLIC SCHOOLS ET AL. *v.* BRADLEY ET AL.; and

No. 73–436. GROSSE POINTE PUBLIC SCHOOL SYSTEM *v.* BRADLEY ET AL. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1038.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and a total of 15 minutes allotted for that purpose. Motion of National Education Assn. for leave to file a brief as *amicus curiae* granted.

No. 73–482. MICHIGAN *v.* TUCKER. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1062.] Motion for appointment of counsel granted. It is ordered that Kenneth M. Mogill, Esquire, of Detroit, Michigan, be, and he is hereby, appointed to serve as counsel for respondent in this case and to argue *pro hac vice*.

No. 73–689. MANESS *v.* MEYERS, JUDGE. 169th Jud. Dist. Ct. Tex., Bell County, Tex. Motion to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before March 21, 1974.

No. 73–717. ANTOINE ET UX. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 73–786. ROSS ET AL. *v.* MOFFITT. C. A. 4th Cir. [Certiorari granted, 414 U. S. 1128.] Motions of respondent for leave to proceed herein *in forma pauperis* and for appointment of counsel granted. It is ordered that Thomas B. Anderson, Jr., Esquire, of Durham, North Carolina, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 73–831. WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO. C. A. 3d Cir. [Certiorari granted, 414 U. S. 1128.] Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 73–918. PELL ET AL. *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. [Probable jurisdiction noted, 414 U. S. 1155.] Motion of appellants for additional time for oral argument granted and a total of one and one-half hours allotted for oral argument in consolidated cases No. 73–754 [*Procunier* v. *Hillery*, probable jurisdiction noted, 414 U. S. 1127] and No. 73–918.

No. 73–1006. MARTIN-TRIGONA *v.* SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Motion to dispense with printing petition denied but without prejudice to the Circuit Justice's considering the papers as an application for extension of time within which to file petition properly printed under Rule 39 of the Rules of this Court.

No. 73–5939. MAEMPE *v.* ENOMOTO;

No. 73–5975. WASHINGTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 73–6065. SKINNER *v.* WARDEN, BALTIMORE COUNTY JAIL;

No. 73–6087. ANDERSON *v.* MISSISSIPPI;

No. 73–6120. DELESPINE *v.* ESTELLE, CORRECTIONS DIRECTOR; and

No. 73–6160. CONNER *v.* ROBUCK ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 73–5724. COZZETTI *v.* THOMPSON, U. S. DISTRICT JUDGE; and

No. 73–5760. TATE *v.* DE MASCIO, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 73–659. INDIANA *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Motion of respondent Brooks [see *Brooks* v. *Center Township,* 485 F. 2d 383] for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for writ of mandamus, prohibition, and/or certiorari denied.

No. 73–976. JOHNSON *v.* WILMER ET AL. Motion for leave to file petition for writ of mandamus, prohibition, and/or certiorari denied. Treating the papers presented as a petition for certiorari, MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–744. LUONGO, U. S. DISTRICT JUDGE *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 73–759. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* HEALY ET AL. Appeal from D. C. E. D. La. Probable jurisdiction noted and case set for oral argument with No. 73–5744 [immediately *infra*]. Reported below: 363 F. Supp. 1110.

No. 73–5744. TAYLOR *v.* LOUISIANA. Appeal from Sup. Ct. La. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case set for oral argument with No. 73–759 [immediately *supra*]. Reported below: 282 So. 2d 491.

No. 73–762. SOSNA *v.* IOWA ET AL. Appeal from D. C. N. D. Iowa. Probable jurisdiction noted. In addition to questions presented in the jurisdictional statement, parties requested to address themselves to question of whether the United States District Court should have proceeded to the merits of the constitutional issue presented in light of *Younger* v. *Harris,* 401 U. S. 37 (1971) and related cases. Reported below: 360 F. Supp. 1182.

No. 73–776. SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* BALLARD. Appeal from D. C. S. D. Cal. Probable jurisdiction noted. Reported below: 360 F. Supp. 643.

No. 73–848. FUSARI, COMMISSIONER OF LABOR *v.* STEINBERG ET AL. Appeal from D. C. Conn. Motion of appellee Miranda for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 364 F. Supp. 922.

No. 73–898. GOSS ET AL. *v.* LOPEZ ET AL. Appeal from D. C. S. D. Ohio. Probable jurisdiction noted. Reported below: 372 F. Supp. 1279.

No. 73–938. COX BROADCASTING CORP. ET AL. *v.* COHN. Appeal from Sup. Ct. Ga. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 231 Ga. 60, 200 S. E. 2d 127.

No. 73–6033. ROE ET AL. *v.* NORTON, COMMISSIONER OF WELFARE. Appeal from D. C. Conn. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 365 F. Supp. 65.

Certiorari Granted

No. 73–822. FRY ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari granted. Reported below: 487 F. 2d 936.

No. 73–1004. SOUTHEASTERN PROMOTIONS, LTD. *v.* CONRAD ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 486 F. 2d 894.

No. 73–5845. JACKSON *v.* METROPOLITAN EDISON CO. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 483 F. 2d 754.

No. 73–696. EMPORIUM CAPWELL CO. *v.* WESTERN ADDITION COMMUNITY ORGANIZATION ET AL.; and

No. 73–830. NATIONAL LABOR RELATIONS BOARD *v.* WESTERN ADDITION COMMUNITY ORGANIZATION ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 158 U. S. App. D. C. 138, 485 F. 2d 917.

Certiorari Denied. (See also Nos. 73–285, 73–766, 73–951, and 73–1005, *supra.*)

No. 73–327. WOODBURY ET AL. *v.* SPITLER. Sup. Ct. Ohio. Certiorari denied. Reported below: 34 Ohio St. 2d 134, 296 N. E. 2d 526.

No. 73–487. BREWER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 486 F. 2d 507.

No. 73–525. CUEVAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 279 So. 2d 817.

No. 73–565. RISLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 279 So. 2d 154.

No. 73–585. KUSS ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 436, 299 N. E. 2d 249.

No. 73–612. DEVORE ET AL. *v.* WEYERHAEUSER CO. Sup. Ct. Ore. Certiorari denied. Reported below: 265 Ore. 388, 508 P. 2d 220.

No. 73–613. UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES & CANADA, LOCAL 540, ET AL. *v.* LUSK. C. A. 4th Cir. Certiorari denied. Reported below: 480 F. 2d 921.

No. 73–615. PRUDHOMME *v.* AL JOHNSON CONSTRUCTION CO.-MASSMAN CONSTRUCTION CO. ET AL. C. A. 5th

Cir. Certiorari denied. Reported below: 478 F. 2d 1401.

No. 73–616. MAKRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 1082.

No. 73–619. SAVE OUR CUMBERLAND MOUNTAINS, INC., ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–624. LAZAROS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 174.

No. 73–638. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 276 So. 2d 550.

No. 73–645. CARDILLO *v.* UNITED STATES; and
No. 73–651. ECONOMY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 481 F. 2d 1397.

No. 73–650. REX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 979.

No. 73–664. RAY BAILLIE TRASH HAULING, INC., ET AL. *v.* KLEPPE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 696.

No. 73–666. PHILLIPS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 481 F. 2d 1405.

No. 73–672. SMITH *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–673. WINTERS *v.* BOHANON, U. S. DISTRICT COURT JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–694. TAGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 481 F. 2d 97.

No. 73–677. BRIGADOON SCOTCH DISTRIBUTORS, LTD., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 480 F. 2d 1047.

No. 73–703. CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* VEEDER-ROOT CO., A DIVISION OF VEEDER INDUSTRIES, INC. Sup. Ct. Conn. Certiorari denied.

No. 73–705. BARON *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (BARON, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–710. SMALDONE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 484 F. 2d 311.

No. 73–714. IMEL ET AL. *v.* ZOHN MANUFACTURING CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 481 F. 2d 181.

No. 73–720. WARNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 73–724. INTERAMERICAN AIR FREIGHT CORP. *v.* CIVIL AERONAUTICS BOARD. C. A. 9th Cir. Certiorari denied.

No. 73–733. WILSON ET AL. *v.* UNITED BENEFIT LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied.

No. 73–743. MARTIN LINEN SUPPLY CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 1143.

No. 73–745. DiVarco et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 670.

No. 73–763. Hightower *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 296 N. E. 2d 654.

No. 73–764. Beth W. Corp. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1401.

No. 73–768. Local Union No. 229, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America *v.* Affiliated Food Distributors, Inc. C. A. 3d Cir. Certiorari denied. Reported below: 483 F. 2d 418.

No. 73–773. McNeill *v.* Fisher et al. Ct. App. D. C. Certiorari denied.

No. 73–780. Preux *v.* Immigration and Naturalization Service et al. C. A. 10th Cir. Certiorari denied. Reported below: 484 F. 2d 396.

No. 73–798. Francisco Enterprises, Inc. *v.* Kirby et al. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 481.

No. 73–799. Bay Sound Transportation Co. et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1397.

No. 73–803. Leblanc *v.* Cardwell Manufacturing Co. C. A. 5th Cir. Certiorari denied.

No. 73–807. Cylinder Gas, Chemical, Petroleum, Auto-Service & Accessory Drivers, Maintenance, Mechanics, Helpers & Inside Employees Local No. 283, International Brotherhood of Teamsters,

CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* OTTAWA SILICA CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 482 F. 2d 945.

No. 73–813. CITY OF CHICAGO ET AL. *v.* HAMPTON, ADMINISTRATRIX, ET AL.; and

No. 73–821. HANRAHAN ET AL. *v.* HAMPTON, ADMINISTRATRIX, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 602.

No. 73–815. ROBERTS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 497 S. W. 2d 666.

No. 73–816. KELSEY-HAYES CO. *v.* DUNLOP CO., LTD.; and

No. 73–973. DUNLOP CO., LTD. *v.* KELSEY-HAYES CO. C. A. 6th Cir. Certiorari denied. Reported below: 484 F. 2d 407.

No. 73–818. BIGGER ET AL. *v.* CITY OF PONTIAC ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 390 Mich. 1, 210 N. W. 2d 1.

No. 73–836. HENDERSON, WARDEN *v.* BARRABINO. Sup. Ct. La. Certiorari denied. Reported below: 283 So. 2d 764.

No. 73–847. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 486 F. 2d 476.

No. 73–851. BATES *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 294 N. E. 2d 185.

No. 73–860. MINYARD ET AL. *v.* SHIRLEY. Sup. Ct. Ariz. Certiorari denied. Reported below: 109 Ariz. 510, 513 P. 2d 939.

No. 73–863. HOZIE *v.* HOZIE. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–866. Ross *v.* California. C. A. 9th Cir. Certiorari denied.

No. 73–880. Lionel Corp. *v.* Republic Technology Fund, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 483 F. 2d 540.

No. 73–882. McGurren *v.* Ettelson et al. C. A. 7th Cir. Certiorari denied. Reported below: 485 F. 2d 1251.

No. 73–883. Franklin Steel Products, Inc. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 400.

No. 73–884. Mendoza et al. *v.* United Farm Workers Organizing Committee et al. C. A. 9th Cir. Certiorari denied.

No. 73–890. Erie Lackawanna Railway Co. *v.* Norfolk & Western Railway Co. C. A. 6th Cir. Certiorari denied.

No. 73–896. Worthen Bank & Trust Co., N. A. *v.* National BankAmericard Inc. C. A. 8th Cir. Certiorari denied. Reported below: 485 F. 2d 119.

No. 73–900. Libbey-Owens-Ford Co. *v.* Shatterproof Glass Corp. C. A. 6th Cir. Certiorari denied. Reported below: 482 F. 2d 317.

No. 73–904. DeBerry *v.* Kentucky. Ct. App. Ky. Certiorari denied. Reported below: 500 S. W. 2d 64.

No. 73–907. B & J Manufacturing Co. *v.* Solar Industries, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 483 F. 2d 594.

No. 73–910. Spence et al. *v.* Spence et al. Sup. Ct. N. C. Certiorari denied. Reported below: 283 N. C. 671, 198 S. E. 2d 537.

No. 73–919. BUXTON *v.* FUGAZI. C. A. 9th Cir. Certiorari denied.

No. 73–920. KERNS *v.* JORDON ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–921. GROSSMAN *v.* STATE BAR GRIEVANCE BOARD. Sup. Ct. Mich. Certiorari denied. Reported below: 390 Mich. 157, 211 N. W. 2d 21.

No. 73–946. GROSSMAN *v.* STATE BAR GRIEVANCE BOARD. Sup. Ct. Mich. Certiorari denied.

No. 73–923. SOLO CUP CO. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (ILLINOIS TOOL WORKS, INC., REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 73–932. SKEEN *v.* VALLEY BANK OF NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 89 Nev. 301, 511 P. 2d 1053.

No. 73–942. O'NEILL ET AL. *v.* CRAIG. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 493 S. W. 2d 898.

No. 73–945. JONES ET AL. *v.* GAINES. C. A. 8th Cir. Certiorari denied. Reported below: 486 F. 2d 39.

No. 73–947. DESALVO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 12, 295 N. E. 2d 750.

No. 73–950. MEGEL ET UX. *v.* CITY OF PAPILLION ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 190 Neb. 238, 207 N. W. 2d 377.

No. 73–954. STANDARD OIL COMPANY OF CALIFORNIA ET AL. *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 191.

No. 73–959. FRIEND *v.* LIPPMAN ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 277 So. 2d 318.

No. 73–962. PHELPS *v.* COVEY, REFEREE IN BANKRUPTCY. C. A. 7th Cir. Certiorari denied.

No. 73–970. BRINKERHOFF ET AL. *v.* AMFAC, INC. C. A. 9th Cir. Certiorari denied. Reported below: 485 F. 2d 1389.

No. 73–979. KEALEY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 73–981. ELLIOTT ET AL. *v.* CHRYSLER MOTORS CORP. ET AL. Sup. Ct. Nev. Certiorari denied.

No. 73–986. DOTLICH *v.* DOTLICH. C. A. 8th Cir. Certiorari denied.

No. 73–990. SWEET ET AL. *v.* SWEET, ANCILLARY ADMINISTRATOR. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 276 So. 2d 253.

No. 73–992. RIZZO, MAYOR OF PHILADELPHIA, ET AL. *v.* FARBER ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–1000. WILSON *v.* KRANTZ ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 73–1001. SHELL OIL CO. *v.* MARINELLO, DBA GARDEN SHELL STATION. Sup. Ct. N. J. Certiorari denied. Reported below: 63 N. J. 402, 307 A. 2d 598.

No. 73–1010. MITCHELL *v.* NORFOLK & WESTERN RAILWAY CO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 73–1020. DAVIS *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 485 F. 2d 677.

No. 73–1025. POINT EAST ONE CONDOMINIUM CORP., INC., ET AL. *v.* POINT EAST MANAGEMENT CORP. ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 282 So. 2d 628.

No. 73–1028. SKENDZEL ET AL. *v.* MARSHALL ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 301 N. E. 2d 641.

No. 73–1037. PACIFIC INDEMNITY CO. *v.* ACEL DELIVERY SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 1169.

No. 73–1042. LAMBERT *v.* CLARK ET AL. C. A. 1st Cir. Certiorari denied.

No. 73–1048. ROGERS *v.* BURTON ET AL. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 496 S. W. 2d 673.

No. 73–1059. HAMILTON MANUFACTURING CO. *v.* METAL BUILDINGS INSULATION, INC., ET AL. Ct. App. Wash. Certiorari denied. Reported below: 9 Wash. App. 284, 513 P. 2d 102.

No. 73–5272. JONES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5292. TATE *v.* FAUVER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 73–5444. BOISSEAU *v.* SCHLESINGER, SECRETARY OF DEFENSE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–5450. CUTTER ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 261 S. C. 140, 199 S. E. 2d 61.

No. 73–5483. GOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 655.

No. 73–5498. MARROQUIN-GUERRERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5532. PERRAULT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 655.

No. 73–5537. ALLEN, AKA HAMMOND, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 2d 1401.

No. 73–5557. PEDLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5559. FALLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1402.

No. 73–5560. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 484 F. 2d 165.

No. 73–5566. MUHAMMED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5570. PAULDINO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5571. MCCALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 936.

No. 73–5573. FLETCHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5575. SHATZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5577. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5580. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5584. HASTINGS *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 1202.

No. 73–5585. WATTS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 484 F. 2d 26.

No. 73–5586. JOHNSON *v.* UNITED STATES; and
No. 73–5590. ESTES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 158 U. S. App. D. C. 299, 485 F. 2d 1078.

No. 73–5591. BONOMO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5592. COCKROFT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5593. MIDDLETON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–5599. POWERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 482 F. 2d 941.

No. 73–5607. MCWILLIAMS ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 496 S. W. 2d 630.

No. 73–5610. WALLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 486 F. 2d 229.

No. 73–5612. RANDALL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5613. BENNETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–5622. PARENT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 726.

No. 73–5626. ROTHWELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 483 F. 2d 1399.

No. 73–5629. ARRADONDO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 483 F. 2d 980.

No. 73–5634. FISHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 484 F. 2d 868.

No. 73–5635. ANDERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 484 F. 2d 746.

No. 73–5639. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 484 F. 2d 909.

No. 73–5648. PORTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5649. LANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 93.

No. 73–5653. MINNIX *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–5654. LEWIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–5658. OWENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5659. SILVAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 73–5666. SMITH *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 484 F. 2d 1188.

No. 73–5670. LAEHN *v.* SCHMIDT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–5673. RITTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5676. WATSON *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 73–5690. LEFTWICH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5691. NORWOODS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–5703. WHEAT ET AL. *v.* HALL, SECRETARY, HUMAN RELATIONS AGENCY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 32 Cal. App. 3d 928, 108 Cal. Rptr. 508.

No. 73–5704. ESPINOZA *v.* ENOMOTO. C. A. 9th Cir. Certiorari denied.

No. 73–5708. MASON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5737. SAJEDAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5762. MILLER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–5798. PENIGAR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5806. VARGAS *v.* METZGER. Sup. Ct. Ohio. Certiorari denied. Reported below: 35 Ohio St. 2d 116, 298 N. E. 2d 600.

No. 73–5814. JOHNSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 50 Ala. App. 726, 282 So. 2d 345.

No. 73–5816. JOYNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 73–5824. BRIDWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5837. TALLEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–5843. QUINONES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5844. CAUTHEN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 18 N. C. App. 591, 197 S. E. 2d 567.

No. 73–5846. DULLES *v.* DULLES. Ct. App. D. C. Certiorari denied.

No. 73–5847. MESSINGER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 8 Wash. App. 829, 509 P. 2d 382.

No. 73–5850. ALEXANDER ET AL. *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 73–5856. SNYDER *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 73–5861. NICHOLS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5866. MCKINNEY *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 498 S. W. 2d 768.

No. 73–5869. BRADLEY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 73–5880. COOK *v.* BLACKLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–5881. TILLEY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 18 N. C. App. 291, 196 S. E. 2d 818.

No. 73–5882. RIFFERT *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 73–5886. ALEXANDER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 284 N. C. 87, 199 S. E. 2d 450.

No. 73–5887. TERRELL ET VIR *v.* GARCIA. Ct. Civ. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 496 S. W. 2d 124.

No. 73–5898. JONES *v.* JONES. Ct. App. Ky. Certiorari denied.

No. 73–5899. ALEXANDER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 73–5905. DE TORO *v.* VELEZ, CHAIRMAN, INDUSTRIAL COMMISSION OF PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 73–5913. NAJAIB *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 73–5915. KAPLAN *v.* CONTINENTAL CAN CO., INC. Sup. Ct. N. J. Certiorari denied.

No. 73–5917. CROWE *v.* SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 484 F. 2d 1359.

No. 73–5922. JONES *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1400.

No. 73–5924. LOPEZ ET AL. *v.* LUGINBILL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 483 F. 2d 486.

No. 73–5929. CORDOVA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 109 Ariz. 439, 511 P. 2d 621.

No. 73–5931. ORR *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5934. SCOTT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–5935. SZABO *v.* BLACK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 73–5937. MULLEN *v.* GEORGIA. C. A. 5th Cir. Certiorari denied.

No. 73–5940. MUMFORD *v.* BROFMAN, JUDGE. C. A. 10th Cir. Certiorari denied.

No. 73–5942. BRONSON *v.* BRONSON. Ct. App. Tenn. Certiorari denied.

No. 73–5944. MOORE *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 483 F. 2d 1400.

No. 73–5951. HOUSE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5962. RICHARDSON *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 73–5971. HEARD ET UX. *v.* DEPARTMENT OF MOTOR VEHICLES OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 73–5976. EDWARDS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 55 Ill. 2d 25, 302 N. E. 2d 306.

No. 73–5978. KING *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 63 N. J. 568, 310 A. 2d 483.

No. 73–5979. TRAVIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 10 Ill. App. 3d 714, 295 N. E. 2d 325.

No. 73–5981. ZENGLEIN *v.* MASTHOFF ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5982. MAYBERRY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 51 Ala. App. 343, 285 So. 2d 507.

No. 73–5983. WHATLEY *v.* ANDERSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–5984. HURD *v.* SUPREME COURT OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5985. RICHARDSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 110 Ariz. 48, 514 P. 2d 1236.

No. 73–5986. JENNINGS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 11 Ill. App. 3d 132, 296 N. E. 2d 19.

No. 73–5987. MINOR *v.* NICHOLSON, JUDGE, ET AL. Ct. App. Ky. Certiorari denied.

No. 73–5994. DUNNAVILLE *v.* VIRGINIA. Cir. Ct., City of Roanoke, Va. Certiorari denied.

No. 73–5997. JUTILA *v.* RESHETYLO, HOSPITAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 73–5998. CLEMMER *v.* MAZURKIEWICZ, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 73–6002. MAGEE *v.* NELSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 73–6003. DALLAS *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–6014. LINEBACK *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 296 N. E. 2d 788.

No. 73–6016. BREMER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 18 Md. App. 291, 307 A. 2d 503.

No. 73–6019. WAIT *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 8 Wash. App. 787, 509 P. 2d 372.

No. 73–6028. MINOVICH *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 18 Md. App. 368, 306 A. 2d 642.

No. 73–6029. LOTT *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–6053. MIRSKY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 73–6071. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6091. FALKNER ET UX. *v.* CULLEN, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 922.

No. 73–6101. HANCOCK *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 73–233. SLAYTON, PENITENTIARY SUPERINTENDENT *v.* SPELLER. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 73–901. HENDERSON, WARDEN *v.* HALE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 485 F. 2d 266.

No. 73–1045. LOUISIANA *v.* NEWMAN. Sup. Ct. La. Motion of respondent for leave to proceed *in forma*

pauperis granted. Certiorari denied. Reported below: 283 So. 2d 756.

No. 73–265. SEMEL *v.* FEDERAL SUPPLY CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 1269.

No. 73–272. REYNOLDS ET AL. *v.* CITY OF SACRAMENTO ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 9 Cal. 3d 405, 509 P. 2d 497.

No. 73–287. BORSERINE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 273 So. 2d 802.

No. 73–344. OWEN ET AL. *v.* MUSICK, SHERIFF. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 9 Cal. 3d 405, 509 P. 2d 497.

No. 73–492. KUNSTSAMMLUNGEN ZU WEIMAR *v.* FEDERAL REPUBLIC OF GERMANY ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 231.

No. 73–529. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 214.

No. 73–709. CANADIAN PARKHILL PIPE STRINGING, LTD., ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 692.

No. 73–719. SANTANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 365.

No. 73–735. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO *v.* DOW CHEMICAL CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 433.

No. 73–876. CONTRERAS ET AL. *v.* GROWER SHIPPER VEGETABLE ASSOCIATION OF CENTRAL CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 1346.

No. 73–892. MANN *v.* SMITH ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 488 F. 2d 245.

No. 73–915. MORAN *v.* RAYMOND CORP. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 1008.

No. 73–1041. LEE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 513 P. 2d 125 and 1321.

No. 73–5347. LEMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 1214.

No. 73–5348. GEE ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 642.

No. 73–5561. SAVAGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 482 F. 2d 1371.

No. 73–5572. PECK *v.* WYOMING ET AL. Sup. Ct. Wyo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5621. THROWER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 283.

No. 73–5636. WEISLOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 560.

No. 73–5651. MAISONET *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 1356.

No. 73–5722. FERGUSON *v.* GATHRIGHT, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 504.

No. 73–5751. FRYE *v.* DODDRILL ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5820. LOCKETT *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 62.

No. 73–5890. WHITESIDE *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5946. BAZIS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 190 Neb. 586, 210 N. W. 2d 919.

No. 73–686. TELEPHONE USERS ASSN., INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 304 A. 2d 293.

No. 73–687. TELEPHONE USERS ASSN., INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 73–778. SWOAP, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE *v.* HYPOLITE ET AL. Ct. App. Cal., 1st App. Dist. Motion of respondent Hypolite for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 32 Cal. App. 3d 979, 108 Cal. Rptr. 751.

No. 73–835. WHITE, SECRETARY OF STATE OF TEXAS *v.* WHATLEY ET AL. C. A. 5th Cir. Motion of LeRoy E. Symm, Voter Registrar of Waller County, Texas, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 482 F. 2d 1230.

No. 73–879. CALIFORNIA INDEPENDENT TELEPHONE ASSN. ET AL. *v.* PUBLIC UTILITIES COMMISSION ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 73–906. PATTERSON ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (VUN CANNON, REAL PARTY IN INTEREST). C. A. 9th Cir. Motion of respondent Vun Cannon for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 73–928. ROEDER ET UX. *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 73–1017. UNITED STATES *v.* WALT DISNEY PRODUCTIONS. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 480 F. 2d 66.

No. 73–1013. STONE & WEBSTER ENGINEERING CORP. *v.* VIRGINIA ELECTRIC & POWER CO., FOR THE USE AND BENEFIT OF INSURANCE COMPANY OF NORTH AMERICA; and

No. 73–1014. WESTINGHOUSE ELECTRIC CORP. *v.* VIRGINIA ELECTRIC & POWER CO., FOR THE USE AND BENEFIT OF INSURANCE COMPANY OF NORTH AMERICA. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 485 F. 2d 78.

No. 73–1067. SEABOARD AIR LINE RAILROAD CO. *v.* WILLIAMS. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 283 So. 2d 33.

No. 73–952. ECTOR *v.* CITY OF TORRANCE ET AL. Sup. Ct. Cal. Motion of American Civil Liberties Union of Southern California for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 10 Cal. 3d 129, 514 P. 2d 433.

No. 73–971. D. C. TRANSIT SYSTEM, INC. *v.* DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Motions of Potomac Electric Power Co. and Washington Gas Light Co. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 158 U. S. App. D. C. 7 and 107, 485 F. 2d 786 and 886.

No. 73–1027. INDIANA *v.* ADAMS. Sup. Ct. Ind. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing that judgment below rests upon an adequate state ground. Reported below: —— Ind. ——, 299 N. E. 2d 834.

No. 73–5679. WRIGHT *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 2d 405.

MR. JUSTICE DOUGLAS, dissenting.

The petitioner in this case challenges the admission at his trial for rape of certain self-incriminating statements. The statements were the result of police interrogation preceded by warnings which the petitioner asserts to be inadequate in light of the requirements enunciated in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The warning petitioner received stated in pertinent part:

> "You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to Court.*" (Emphasis added.)

Petitioner contends that the right to appointed counsel only "if and when he goes to court" is contrary to *Miranda, supra,* where we said:

> "This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that *if he cannot afford one, a lawyer will be provided for him prior to any interrogation.*" *Id.*, at 474 (emphasis added).

The validity of warnings which advise only of some *in futuro* right to counsel is an issue on which lower courts are divided. Courts of Appeals for the Seventh, Ninth, and Tenth Circuits have all concluded that such

warnings are inadequate compliance with *Miranda*.[1] In this case the Court of Appeals for the Fourth Circuit joined the Second, Fifth, and Eighth Circuits in holding the warnings adequate.[2] State courts are also widely divided on this issue, with Alabama, Arkansas, Idaho, Kansas, Oklahoma, and Washington finding the warnings insufficient[3] while Illinois, Indiana, Michigan, Mississippi, and New York have reached a contrary result.[4]

We are, of course, the only source of resolution for this conflict and it is our obligation to provide uniformity on such important federal constitutional questions. In reforming the Court's jurisdiction in 1925 the purpose was to allow us to "hear and determine those cases which should alone engage [our] attention," since under the prior law the Court was "hindered from . . . efficiently functioning in the performance of its highest duty of interpreting the Constitution and preserving uniformity of decision by the intermediate courts of appeals." H. R. Rep. No. 1075, 68th Cong., 2d Sess., 2 (1925). Mr.

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[1] *Williams* v. *Twomey*, 467 F. 2d 1248 (CA7 1972); *United States* v. *Garcia*, 431 F. 2d 134 (CA9 1970); *Coyote* v. *United States*, 380 F. 2d 305 (CA10), cert. denied, 389 U. S. 992 (1967).

[2] *Massimo* v. *United States*, 463 F. 2d 1171 (CA2 1972), cert. denied, 409 U. S. 1117 (1973); *United States* v. *Lacy*, 446 F. 2d 511 (CA5 1971); *Klingler* v. *United States*, 409 F. 2d 299 (CA8 1969).

[3] *Square* v. *State*, 283 Ala. 548, 219 So. 2d 377 (1968); *Moore* v. *State*, 251 Ark. 436, 472 S. W. 2d 940 (1971); *State* v. *Grierson*, 95 Idaho 155, 504 P. 2d 1204 (1972) (dicta); *State* v. *Carpenter*, 211 Kan. 234, 505 P. 2d 753 (1973); *Schorr* v. *State*, 499 P. 2d 450 (Okla. Cr. App. 1972); *State* v. *Creach*, 77 Wash. 2d 194, 461 P. 2d 329 (1969).

[4] *People* v. *Williams*, 131 Ill. App. 2d 149, 264 N. E. 2d 901 (1970); *Jones* v. *State*, 253 Ind. 235, 252 N. E. 2d 572 (1969); *People* v. *Campbell*, 26 Mich. App. 196, 182 N. W. 2d 4 (1970), cert. denied, 401 U. S. 945 (1971); *Evans* v. *State*, 275 So. 2d 83 (Miss. 1973); *People* v. *Swift*, 32 App. Div. 2d 183, 300 N. Y. S. 2d 639 (1969), cert. denied, 396 U. S. 1018 (1970).

Justice Van Devanter had told Congress that the prime consideration in the exercise of discretionary jurisdiction was "whether the case is of such a character that the last word, the ultimate guiding rule, should be announced by the Supreme Court, so that there may be uniformity of decision in the several circuit courts of appeals, and also uniformity of decision in the State courts in so far as Federal matters are concerned." Hearings on Procedure in Federal Courts before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 29–30 (1924).

Because of the present conflict, the extent of one's federal constitutional rights varies according to the State or Circuit in which the question is presented. I would grant certiorari in order to resolve the issue and provide uniformity.

No. 73–5688. HART *v.* COINER, WARDEN. C. A. 4th Cir. Petition for writ of certiorari denied as untimely filed. 28 U. S . C. § 2101 (c). Reported below: 483 F. 2d 136.

No. 73–5900. DAWKINS ET AL. *v.* CRAIG, COMMISSIONER OF SOCIAL SERVICES OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Petition for writ of certiorari denied as untimely filed. 28 U. S. C. § 2101 (c). Reported below: 483 F. 2d 1191.

No. 73–5992. MATHIS *v.* ALABAMA. Sup. Ct. Ala. Certiorari and other relief denied. Reported below: See 288 Ala. 464, 262 So. 2d 287.

Rehearing Denied

No. 72–6762. SMILGUS *v.* BERGMAN ET AL., 414 U. S. 842, 1052. Motion for leave to file second petition for rehearing and other relief denied.

No. 72–6576. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL., 414 U. S. 880;

No. 72–6790. SMILGUS *v.* LETTS, JUDGE, 414 U. S. 843;

No. 72–6930. EX PARTE KENT, 414 U. S. 1077;

No. 73–459. NEW RIDER ET AL. *v.* BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1, PAWNEE COUNTY, OKLAHOMA, ET AL., 414 U. S. 1097;

No. 73–621. UNION PACIFIC RAILROAD CO. ET AL. *v.* CITY AND COUNTY OF DENVER ET AL., 414 U. S. 1088;

No. 73–636. COKER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 414 U. S. 1130;

No. 73–663. WESSON *v.* LEVIN ET AL., 414 U. S. 1112;

No. 73–728. CITY OF MIAMI *v.* SPICY, 414 U. S. 1131;

No. 73–5288. D'ORSAY *v.* UNITED STATES, 414 U. S. 1070;

No. 73–5399. WHITE *v.* UNITED STATES, 414 U. S. 1132;

No. 73–5477. RING *v.* CALIFORNIA, 414 U. S. 1072;

No. 73–5513. FRIST *v.* HAYNSWORTH, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL., 414 U. S. 1073;

No. 73–5597. SERRANO *v.* NEW YORK, 414 U. S. 1075;

No. 73–5625. FREED ET AL. *v.* MICHIGAN DEPARTMENT OF TREASURY, REVENUE DIVISION, 414 U. S. 1075; and

No. 73–5632. LYONS *v.* INDIANA, 414 U. S. 1096. Petitions for rehearing denied.

No. 72–6704. DILLARD *v.* NEW YORK CITY TRANSIT AUTHORITY, 414 U. S. 839; and

No. 73–5086. WHETTON *v.* TURNER, WARDEN, 414 U. S. 862. Motions for leave to file petitions for rehearing denied.

No. 73–254. DORL *v.* UNITED STATES, 414 U. S. 1032. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 73–5467. LEGION ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., 414

U. S. 1058. Motion to defer consideration denied. MR. JUSTICE BLACKMUN would grant the motion. Motions for leave to file briefs as *amici curiae* in support of rehearing filed by the following were granted: American Nurses Assn., American Orthopsychiatric Assn., Inc., National Association for the Advancement of Colored People, Association of Black Psychologists, Black Psychiatrists of America, Inc., National Health Law Program, Congress of Racial Equality, National Conference of Black Lawyers, American Medical Assn., National Black Feminist Organization, National Urban League, Inc., and National Medical Assn., Inc. Petition for rehearing denied.

FEBRUARY 20, 1974

Certiorari Denied

No. 73–660. NEFF *v.* MORAN. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 73–5868. MORAN *v.* NEFF. C. A. 4th Cir. Certiorari denied.

MR. JUSTICE DOUGLAS, dissenting.

The petitioner brought this federal habeas corpus action to challenge his Virginia conviction for possession of controlled drugs with intent to distribute. The District Court granted the writ as to one ground, challenged here by the State in the related matter of *Neff* v. *Moran*, No. 73–660, certiorari denied today (immediately *supra*), but rejected the petitioner's claim that evidence seized in a warrantless search should have been suppressed. The Court of Appeals affirmed in reliance upon the District Court's opinion.

An informer who had given accurate information in the past called State Police Investigator Mitchell concerning the possession and sale of controlled drugs at a

truck-stop motel. He provided Mitchell with a physical description of the petitioner and trailor-tractor rig, the license number of the rig, and the number of petitioner's motel room. Mitchell made no attempt to secure a search warrant based upon this information. Rather, he called three other officers to his home where they arranged a plan whereby Mitchell would present himself to petitioner as a truck driver and attempt to purchase drugs. Two hours later the officers arrived at the motel, but found petitioner's room unoccupied and his truck absent. Soon afterward they saw the described rig on a nearby freeway. Mitchell pulled the truck over and informed petitioner that he had probable cause to believe that he was transporting illegal drugs, and that his vehicle would be searched. Petitioner came down from the rig and a search of his person revealed a vial containing five pills. A subsequent search inside the cab, however, produced a considerable cache of drugs in the glove compartment, a cigar box, a briefcase, and a suitcase, all of which had to be opened by the officers.

Petitioner here does not contest the District Court's conclusion that the officers had probable cause. But "no amount of probable cause can justify a warrantless seizure," *Coolidge* v. *New Hampshire,* 403 U. S. 443, 471. The District Court found, however, that there were exigent circumstances justifying the warrantless search, since here there was an "out-of-state truck on a highway leading out of the jurisdiction." The petitioner argues that there were no exigent circumstances precluding the police from securing a warrant in the first instance, before going to the motel room, or after stopping the truck. He draws support from the District Court's own findings. The informer provided the police with no information suggesting that petitioner would soon be leaving the motel, and it was not a perception

of need for immediate action that led the police to choose their course. Rather, the District Court found that "Officer Mitchell admittedly desired to circumvent the warrant process in order to protect his informant's identity." Although the officer's reasoning was erroneous, as there is no requirement that the informer be identified in obtaining a warrant, the District Court concluded that the police were acting "in good faith," so that the "investigative tactics, although dilatory with reference to the procurement of a warrant, were not so unreasonable as to constitute a conscious disregard and avoidance of the warrant process."

But "good faith" cannot under the Fourth Amendment justify a warrantless search. An officer may in good faith believe there is ample probable cause to justify a search, but the Constitution requires that decision to be made by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, 333 U. S. 10, 14. Nor can an officer's good-faith belief that no warrant was required render unnecessary a judicial officer's independent determination of whether the search was reasonable under the Fourth Amendment.

Nor can this search be justified as incident to a valid arrest, and the District Court so held, since "Mitchell had no intention of arresting or detaining [petitioner] unless he discovered narcotics within his possession." Thus, this is a simple case, presenting the question of whether a police officer with ample time to secure a warrant may deliberately circumvent this constitutional requirement on the basis of his judgment that the police will be more effective without judicial oversight of his decision to search. My views on the necessity for obtaining a warrant are detailed in my dissenting opinion in

United States v. *Matlock*, *ante*, p. 178, decided this day. On that basis I would grant this petition for certiorari.

FEBRUARY 25, 1974

Affirmed on Appeal

No. 73–987. GUGGENHEIM, DIRECTOR, DEPARTMENT OF LIQUOR CONTROL, ET AL. *v.* PETO, DBA LOOP CARRY OUT. Affirmed on appeal from D. C. S. D. Ohio. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 364 F. Supp. 1.

No. 73–1087. KOSCHERAK ET AL. *v.* SCHMELLER ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 363 F. Supp. 932.

Appeal Dismissed

No. 73–6036. FISCHLER *v.* ITT FEDERAL ELECTRIC CORP. ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed and Remanded. (See No. 73–428, *ante*, p. 239.)

Miscellaneous Orders

No. A–741. DAVISON *v.* FLORIDA. Application for stay of mandate of the Supreme Court of Florida presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would grant the stay. Reported below: 288 So. 2d 483.

No. A–793. BAKER ET AL., TRUSTEES OF PENN CENTRAL TRANSPORTATION CO. *v.* UNITED STATES ET AL. D. C. E. D. Pa. Application for stay presented to MR. JUSTICE

BRENNAN, and by him referred to the Court, denied. Reported below: See 368 F. Supp. 101.

No. D–21. IN RE DISBARMENT OF LIDDY. It having been reported to the Court that George Gordon Liddy, of Oxon Hill, Maryland, has been disbarred from the practice of law in all of the courts of the State of New York, and this Court by order of November 19, 1973 [414 U. S. 1037], having suspended the said George Gordon Liddy from the practice of law in this Court and directed that a rule issue requiring him so show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

It is ordered that the said George Gordon Liddy be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 72–942. HAINSWORTH *v.* WHITE, SECRETARY OF STATE OF TEXAS. Appeal from D. C. W. D. Tex. [Probable jurisdiction noted, 410 U. S. 965.] Motion of appellant for leave to file supplemental brief after argument granted.

No. 72–1713. SECRETARY OF THE NAVY *v.* AVRECH. Appeal from C. A. D. C. Cir. [Probable jurisdiction noted, 414 U. S. 816.] Counsel for parties directed to file within 21 days supplemental briefs on issues of jurisdiction of the District Court and on exhaustion of remedies. Briefs may be typewritten.

No. 72–6160. MITCHELL *v.* W. T. GRANT CO. Sup. Ct. La. [Certiorari granted, 411 U. S. 981.] Motion of the State of Louisiana for leave to file a brief on the merits after argument granted.

No. 73–235. DeFUNIS ET AL. *v.* ODEGAARD ET AL. Sup. Ct. Wash. [Certiorari granted, 414 U. S. 1038.] Motions of National Association of Manufacturers of the United States and Committee on Academic Nondiscrimination and Integrity to file briefs as *amici curiae* denied.

No. 73–300. SAXBE, ATTORNEY GENERAL, ET AL. *v.* BUSTOS ET AL.; and

No. 73–480. CARDONA ET AL. *v.* SAXBE, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. [Certiorari granted, 414 U. S. 1143.] Motion of California Farm Bureau Federation et al. for leave to participate in oral argument as *amici curiae* denied.

No. 73–434. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.;

No. 73–435. ALLEN PARK PUBLIC SCHOOLS ET AL. *v.* BRADLEY ET AL.; and

No. 73–436. GROSSE POINTE PUBLIC SCHOOL SYSTEM *v.* BRADLEY ET AL. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1038.] Motion of respondents Board of Education for the School District of the City of Detroit et al. for leave to participate in oral argument denied.

No. 73–437. MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 73–457. PUBLIC SERVICE COMMISSION OF NEW YORK *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 73–464. MUNICIPAL DISTRIBUTORS GROUP *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. [Certiorari granted, 414 U. S. 1142.] Motion of Shell Oil Co. to recuse MR. JUSTICE DOUGLAS denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 73–482. MICHIGAN *v.* TUCKER. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1062.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and a total of 15 minutes allotted for that purpose. Respondent allotted an additional 15 minutes for oral argument.

No. 73–507. HAMLING ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 414 U. S. 1143.] Motion of petitioners for additional time for oral argument denied.

No. 73–679. WOLFF, WARDEN, ET AL. *v.* MCDONNELL. C. A. 8th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and a total of 15 minutes allotted for that purpose. Respondent allotted an additional 15 minutes for oral argument.

No. 73–1003. NATIONAL INDIAN YOUTH COUNCIL ET AL. *v.* BRUCE ET AL. C. A. 10th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied without prejudice to named individuals to file appropriate affidavits *in forma pauperis*. See 28 U. S. C. § 1915; Rule 53 of the Rules of this Court; and *Pothier* v. *Rodman*, 261 U. S. 307, 309 (1923).

No. 73–5812. WOLF *v.* HOLLOWELL, PENITENTIARY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted or Postponed

No. 73–364. AMERIND *v.* MANCARI ET AL. Appeal from D. C. N. Mex. Motion of appellee Mancari for leave to proceed *in forma pauperis* in this case and in

No. 73–362 [*Morton, Secretary of the Interior* v. *Mancari,* probable jurisdiction noted, 414 U. S. 1142] granted. Motion as to all other appellees in this case and in No. 73–362 denied. Probable jurisdiction noted. Case consolidated with No. 73–362 and a total of one hour allotted for oral argument. Reported below: 359 F. Supp. 585.

No. 73–858. GONZALEZ *v.* AUTOMATIC EMPLOYEES CREDIT UNION ET AL. Appeal from D. C. N. D. Ill. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 363 F. Supp. 143.

Certiorari Granted

No. 73–748. AMERICAN RADIO ASSN., AFL–CIO, ET AL. *v.* MOBILE STEAMSHIP ASSN., INC., ET AL. Sup. Ct. Ala. Certiorari granted. Reported below: 291 Ala. 201, 279 So. 2d 467.

No. 73–1018. UNITED STATES *v.* MAZURIE ET AL. C. A. 10th Cir. Motions of National Tribal Chairmen's Assn. and Shoshone Indian Tribe et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 487 F. 2d 14.

Certiorari Denied. (See also No. 73–6036, *supra.*)

No. 73–675. RUTH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–700. BIONDO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 483 F. 2d 635.

No. 73–722. MOSTAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 485 F. 2d 199.

No. 73–727. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–730. SABATINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 485 F. 2d 540.

No. 73–734. GOMEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–741. FIFTH AVENUE PEACE PARADE COMMITTEE ET AL. *v.* KELLEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 480 F. 2d 326.

No. 73–805. COPPOLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 486 F. 2d 882.

No. 73–849. TUNNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 149.

No. 73–878. PACIFIC TRANSPORT CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 483 F. 2d 209.

No. 73–934. SERVICE TECHNOLOGY CORP., A SUBSIDIARY OF LTV AEROSPACE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 923.

No. 73–974. BRINEGAR, SECRETARY OF TRANSPORTATION *v.* NATIONAL ASSOCIATION OF MOTOR BUS OWNERS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 157 U. S. App. D. C. 291, 483 F. 2d 1294.

No. 73–1040. DISTRICT OF COLUMBIA ET AL. *v.* MARSH. C. A. D. C. Cir. Certiorari denied. Reported below: 158 U. S. App. D. C. 289, 485 F. 2d 1068.

No. 73–1051. BRIGANDI ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 73–1129. HARNOIS *v.* HARNOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 10 Ill. App. 3d 1062, 295 N. E. 2d 511.

No. 73–5567. TREADWELL ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 40 App. Div. 2d 953, 344 N. Y. S. 2d 1045.

No. 73–5641. SAVAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 67.

No. 73–5672. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 482 F. 2d 485.

No. 73–5685. JONES *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1401.

No. 73–5686. APODACA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5693. USKI *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5695. BULL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5700. KURZYNA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 485 F. 2d 517.

No. 73–5709. BOULWARE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5773. CRAWFORD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 1403.

No. 73–5778. SILVERTHORN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 9 Wash. App. 295, 513 P. 2d 108.

No. 73–6032. WHITEAKER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 499 S. W. 2d 412.

No. 73–6044. BRASHIER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 73–6048. MOORE *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 73–6050. OLDEN *v.* PHELPS ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6051. ADAMS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–6057. OLBROT *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 73–6058. PAGE *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 73–6060. SOLES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 16 Md. App. 656, 299 A. 2d 502.

No. 73–6066. REED *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–6155. LONG *v.* HAIRE ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6168. URBAUER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 109 Ariz. 584, 514 P. 2d 717.

No. 72–1503. SEARS, ROEBUCK & CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 153 U. S. App. D. C. 380, 473 F. 2d 91.

No. 73–794. NATIONAL ASSOCIATION OF MOTOR BUS OWNERS ET AL. *v.* BRINEGAR, SECRETARY OF TRANSPORTA-

TION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 157 U. S. App. D. C. 291, 483 F. 2d 1294.

No. 73–737. ESPOSITO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 682.

No. 73–806. NATIONAL PETROLEUM REFINERS ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 157 U. S. App. D. C. 83, 482 F. 2d 672.

No. 73–854. BEVAN *v.* TRUSTEES OF PENN CENTRAL TRANSPORTATION CO.;

No. 73–964. GREENOUGH *v.* TRUSTEES OF PENN CENTRAL TRANSPORTATION CO.; and

No. 73–1039. TWENTY-ONE RETIRED EMPLOYEES *v.* TRUSTEES OF PENN CENTRAL TRANSPORTATION CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 484 F. 2d 1300.

No. 73–1102. TRANSCON LINES *v.* XEROX CORP. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 73–1043. HOLLOWELL, PENITENTIARY SUPERINTENDENT *v.* MCNEAL. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 481 F. 2d 1145.

No. 73–6061. SOLOMON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied for want of final judgment. 28 U. S. C. § 1257.

Rehearing Denied

No. 72–1040. COMMUNIST PARTY OF INDIANA ET AL. *v.* WHITCOMB, GOVERNOR OF INDIANA, ET AL., 414 U. S. 441;

No. 72–1195. AMERICAN PIPE & CONSTRUCTION CO., ET AL. *v.* UTAH ET AL., 414 U. S. 538;

No. 73–573. VACHON *v.* NEW HAMPSHIRE, 414 U. S. 478;

No. 73–618. HARRISON PROPERTY MANAGEMENT CO., INC., ET AL. *v.* UNITED STATES, 414 U. S. 1130;

No. 73–5308. SCHNEIDER *v.* CALIFORNIA, 414 U. S. 1132;

No. 73–5550. MILLER *v.* UNITED STATES, 414 U. S. 1159;

No. 73–5712. CHAVEZ *v.* MCCARTHY, WARDEN, 414 U. S. 1134; and

No. 73–5781. MADDEN *v.* CIRCUIT COURT FOR DODGE COUNTY ET AL., 414 U. S. 1142. Petitions for rehearing denied.

No. 72–1289. NATIONAL RAILROAD PASSENGER CORP. ET AL. *v.* NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, 414 U. S. 453. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Tenth Circuit during the period of March 18, 1974, to March 22, 1974, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

MARCH 4, 1974

Affirmed on Appeal

No. 73–298. VELA ET AL. *v.* VOWELL, COMMISSIONER OF PUBLIC WELFARE OF TEXAS, ET AL. Appeal from D. C. W. D. Tex. Motion of appellants for leave to proceed further herein *in forma pauperis* granted. Judgment affirmed. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 73–6081. BUTLER *v.* WILSON, GOVERNOR OF NEW YORK, ET AL. Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 365 F. Supp. 377.

Appeals Dismissed

No. 73–1083. BENNETT, ADMINISTRATRIX *v.* GEELER ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 11 Ill. App. 3d 51, 295 N. E. 2d 491.

No. 73–6116. MAS *v.* LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal question.

No. 73–1108. PANKO *v.* DONOVAN ET AL. Appeal from Cir. Ct. Cook County, Ill., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 72–6023. BIAS *v.* GIES ET AL. Appeal from D. C. S. D. W. Va. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Patterson* v. *War-*

ner, ante, p. 303; and *State ex rel. Reece* v. *Gies,* —— W. Va. ——, 198 S. E. 2d 211 (1973).

Miscellaneous Orders

No. A–590 (73–1221). CONTINENTAL CASUALTY CO. *v.* WARD. Application for stay of execution of judgment of the Supreme Court of Ohio and for approval of supersedeas bond, presented to MR. JUSTICE DOUGLAS and by him referred to the Court, denied. Reported below: 36 Ohio St. 2d 38, 303 N. E. 2d 861.

No. 72–1603. CARDWELL, WARDEN *v.* LEWIS. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1062.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioner granted and 15 minutes allotted for that purpose. Respondent allotted 15 additional minutes for oral argument.

No. 73–434. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.;

No. 73–435. ALLEN PARK PUBLIC SCHOOLS ET AL. *v.* BRADLEY ET AL.; and

No. 73–436. GROSSE POINTE PUBLIC SCHOOL SYSTEM *v.* BRADLEY ET AL. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1038.] Motion of Inter-Faith Centers for Racial Justice, Inc., for leave to file a brief as *amicus curiae* granted. Motion of National Suburban League, Ltd., for leave to file a brief as *amicus curiae* in No. 73-434 granted.

No. 73–557. JENKINS *v.* GEORGIA. Appeal from Sup. Ct. Ga. [Probable jurisdiction noted, 414 U. S. 1090.] Motion of Directors Guild of America, Inc., for leave to participate in oral argument as *amicus curiae* denied.

No. 73–604. CASS *v.* UNITED STATES; and

No. 73–5661. ADAMS ET AL. *v.* SECRETARY OF THE NAVY ET AL. C. A. 9th Cir. [Certiorari granted, 414 U. S.

1128.] Motion of petitioners in No. 73–5661 for divided argument granted. It is ordered that 15 minutes be allotted to petitioners for oral argument in each of these consolidated cases.

No. 73–631. HOWARD JOHNSON CO., INC. *v.* DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL–CIO. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1091.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 73–679. WOLFF, WARDEN, ET AL. *v.* McDONNELL. C. A. 8th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 73–690. AIR POLLUTION VARIANCE BOARD OF COLORADO *v.* WESTERN ALFALFA CORP. Ct. App. Colo. [Certiorari granted, 414 U. S. 1156.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioner granted and 15 minutes allotted for that purpose. Respondent allotted 15 additional minutes for oral argument.

No. 73–786. ROSS ET AL. *v.* MOFFITT. C. A. 4th Cir. [Certiorari granted, 414 U. S. 1128.] Motion of the State of Virginia for leave to participate in oral argument as *amicus curiae* denied.

No. 73–1016. LASCARIS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF ONONDAGA COUNTY *v.* SHIRLEY ET AL.; and

No. 73–1095. LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* SHIRLEY ET AL. Appeals from D. C. N. D. N. Y. The Solicitor General

is invited to file a brief in these cases expressing the views of the United States.

No. 73–5265. KOKOSZKA *v.* BELFORD, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. [Certiorari granted, 414 U. S. 1091.] Benjamin R. Civiletti, Esquire, of Baltimore, Maryland, a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of judgment below.

No. 73–5412. DILLARD ET AL. *v.* INDUSTRIAL COMMISSION OF VIRGINIA ET AL. Appeal from D. C. E. D. Va. [Probable jurisdiction noted, 414 U. S. 1110.] Motion of appellee Aetna Casualty & Surety Co. for divided argument granted.

No. 73–5872. CAVER *v.* UNITED STATES;

No. 73–5888. VAN HOOK *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION; and

No. 73–6213. JONES *v.* ALABAMA. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted

No. 73–1106. COUSINS ET AL. *v.* WIGODA ET AL. App. Ct. Ill., 1st Dist. Certiorari granted. Reported below: 14 Ill. App. 3d 460, 302 N. E. 2d 614.

No. 73–1265. SAXBE, ATTORNEY GENERAL, ET AL. *v.* WASHINGTON POST CO. ET AL. C. A. D. C. Cir. Certiorari granted. Time for filing appendix and briefs accelerated so that this case may be argued with consolidated cases No. 73–754 [*Procunier* v. *Hillery,* probable jurisdiction noted, 414 U. S. 1127] and No. 73–918 [*Pell* v. *Procunier,* probable jurisdiction noted, 414 U. S. 1155]. A total of two hours allotted for oral argument for all three cases. Reported below: 161 U. S. App. D. C. 75, 494 F. 2d 994.

No. 73–5768. FRANCISCO *v.* GATHRIGHT, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also No. 73–1108, *supra.*)

No. 73–697. GETTELMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 73–731. SNIDER ET AL. *v.* ALL STATE ADMINISTRATORS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 387.

No. 73–755. CREIGHTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 1403.

No. 73–775. NEDD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 281 So. 2d 131.

No. 73–782. HIBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 485 F. 2d 682.

No. 73–930. MARITIME COMMUNICATIONS SERVICE *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 73–948. GILL TRAILER & EQUIPMENT RENTALS, INC. *v.* S. D'ANTONI, INC., ET AL. Sup. Ct. La. Certiorari denied. Reported below: 282 So. 2d 714.

No. 73–1030. HOME INDEMNITY CO. *v.* RUPPEL, DBA YO-RO DIESEL SERVICE, INC., ET AL.; and

No. 73–1036. RUPPEL, DBA YO-RO DIESEL SERVICE, INC. *v.* TRAVELERS INDEMNITY CO. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 296.

No. 73–1081. LONG ISLAND COLLEGE HOSPITAL *v.* NEW YORK STATE LABOR RELATIONS BOARD ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 314, 298 N. E. 2d 614.

No. 73–1094. G. D. SEARLE & Co. *v.* STEELE. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 339.

No. 73–1098. DUBUIT *v.* HARWELL ENTERPRISES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 486 F. 2d 131.

No. 73–1128. DICKS, DBA OZARK GARDENS RESTAURANT, ET AL. *v.* NAFF, MAYOR OF EUREKA SPRINGS, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 255 Ark. 357, 500 S. W. 2d 350.

No. 73–1133. JONES *v.* SMITH ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 278 So. 2d 339.

No. 73–1154. WOLF *v.* WOLF. Sup. Ct. Ohio. Certiorari denied.

No. 73–5702. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5721. ANDERSON ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 239.

No. 73–5755. SHARROW *v.* ABZUG ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5759. BOAG *v.* GUNN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 73–5774. GATTON *v.* SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 2d 1401.

No. 73–5813. MITCHELL *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 113 N. H. 542, 311 A. 2d 134.

No. 73–5826. PORTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5839. HERNANDEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 614.

No. 73–5977. PFEIFER *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–6068. WATSON *v.* DREADIN. Ct. App. D. C. Certiorari denied. Reported below: 309 A. 2d 493.

No. 73–6072. ROOTS *v.* CREWS, JUDGE. C. A. 5th Cir. Certiorari denied.

No. 73–6078. CURRY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 73–6079. PETE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 501 S. W. 2d 683.

No. 73–6083. SAUNDERS *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–6097. DEARING *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 73–6111. STEWART *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 34 Cal. App. 3d 244, 109 Cal. Rptr. 826.

No. 73–6113. DAY, AKA GRANT *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 73–6118. KEIL *v.* GLOVER, AKA EDGAR. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 73–6163. CLARK *v.* RODRIGUEZ, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 73–862. LIMONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–911. DRISCOLL *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 682.

No. 73–1019. DENNIS *v.* WOOD ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 489 F. 2d 849.

No. 73–5620. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 418.

No. 73–5701. BATES *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 90.

No. 73–1056. A & B TRANSFER, INC., ET AL. *v.* S. S. KRESGE CO. C. A. 6th Cir. Motion to defer consideration and certiorari denied. Reported below: 488 F. 2d 894.

No. 73–1097. ELECTRONICS CORPORATION OF AMERICA *v.* HONEYWELL, INC. C. A. 1st Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 487 F. 2d 513.

No. 73–5827. DIGGS *v.* PALMAN ET AL. C. A. D. C. Cir. Motion to strike respondents' memorandum and other relief denied. Certiorari denied.

Rehearing Denied

No. 73–276. LANDRY *v.* HEMPHILL, NOYES & CO. ET AL., 414 U. S. 1002; and

No. 73–5459. TAYLOR *v.* ESTELLE, CORRECTIONS DIRECTOR, 414 U. S. 1159. Petitions for rehearing denied.

No. 73–808. MILLER *v.* BROWN ET AL., 414 U. S. 1158;

No. 73–559. HECK'S, INC. *v.* FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, 414 U. S. 1069; and

No. 73–5675. TARLTON *v.* TEXAS, 414 U. S. 1150. Petitions for rehearing denied.

MARCH 7, 1974

Dismissal Under Rule 60

No. 73–980. MOORE *v.* UNITED STATES. C. A. 7th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 486 F. 2d 1406.

MARCH 8, 1974

Dismissal Under Rule 60

No. 73–6217. MCDONALD *v.* TENNESSEE ET AL. C. A. 6th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

MARCH 18, 1974

Affirmed on Appeal

No. 73–729. CORPORATION COMMISSION OF OKLAHOMA ET AL. *v.* FEDERAL POWER COMMISSION ET AL. Affirmed on appeal from D. C. W. D. Okla. Reported below: 362 F. Supp. 522.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART and MR. JUSTICE POWELL join, dissenting.

"There was a young lady from Niger
Who smiled as she rode on a tiger.
They returned from the ride
With the lady inside,
And the smile on the face of the tiger."

When Congress enacted the Natural Gas Act in 1938, 52 Stat. 821, 15 U. S. C. § 717 *et seq.*, the state regulatory agencies were among its strongest supporters.[1] For, without supplanting any of the existing authority of the state agencies, the Act was intended to provide a powerful regulatory partner, the Federal Power Commission, which could regulate activities where the state bodies could not. As the Senate Report on the bill stated:

> "The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority, and contains provisions for cooperative action with State regulatory bodies." [2]

Yet the Court today affirms a holding of the District Court which permits the Federal Power Commission to sue the Oklahoma Corporation Commission and enjoin the enforcement of those state agency orders which the court finds violate either the Natural Gas Act or the Commerce Clause of the United States Constitution. After this decision, the state regulatory agencies must surely feel a special kinship with the young lady from Niger.

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[1] S. Rep. No. 1162, 75th Cong., 1st Sess., 2–3 (1937).

[2] *Id.*, at 2. This Court has recognized that the Act was not intended to deprive States of their prior authority:

"The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana*, 332 U. S. 507, 517–518 (1947).

The District Court judgment which is here affirmed arose out of an action brought by appellee Federal Power Commission against appellant Corporation Commission of Oklahoma in the United States District Court for the Western District of Oklahoma. The complaint alleged that various orders which had been issued by the Oklahoma Commission were invalid under the Commerce Clause and also conflicted with the authority of the Federal Power Commission granted by the Natural Gas Act. The three-judge District Court which was convened agreed with the contentions of the Federal Power Commission, and enjoined enforcement of the orders of the Oklahoma Commission. 362 F. Supp. 522.

My disagreement with the Court's summary affirmance of this judgment stems, not from any disagreement with the substantive holding of the District Court, but with what seems to me the more important holding that the Federal Power Commission has authority to institute an action such as this at all. Despite the total absence of precedent for such litigation by the Federal Power Commission, and language in the Natural Gas Act which, at least on its face, seems to preclude it, the Court chooses to summarily affirm. At the least, I feel the question deserves plenary consideration.

I

The major share of the Natural Gas Act as it presently exists was passed by Congress in 1938 with the recognition that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." [3] Congress recognized

[3] 15 U. S. C. § 717 (a).

at that time that state regulatory agencies, with authority over intrastate sales and transportation of natural gas, were unable to deal effectively with interstate sales and transportation of that resource. The States themselves acknowledged their inadequacy in this area, and earnestly supported the bill as a supplement to the jurisdictions of their own regulatory agencies.[4] The Act specifically stated that it "shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [5] There can be no doubt, I think, that the autonomy of the state regulatory agencies and their spheres of influence were to be preserved.[6]

The Act grants to the Federal Power Commission extensive authority to regulate the interstate transportation and sale of natural gas. It makes unlawful the establishment of rates and charges which are not "just and reasonable," [7] and further grants to the Commission the power to establish just and reasonable rates where natural gas companies have not done so.[8] "Any State, municipality, or State commission" may file a complaint with the Commission relating to "anything done or omitted to be done by any natural-gas company in contravention of the provisions" of the Natural Gas Act.[9] The Commission is then empowered to hold hearings on

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[4] See n. 1, *supra*.

[5] 15 U. S. C. § 717 (b).

[6] The Court in *Panhandle Eastern Pipe Line Co., supra,* stated: "Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach." 332 U. S., at 519.

[7] 15 U. S. C. § 717c (a).

[8] *Id.*, § 717d (a).

[9] *Id.*, § 717*l*.

the complaint,[10] and the parties are given the right of appeal from any resulting order of the Commission to the appropriate Court of Appeals.[11]

The Act does not simply grant the Commission administrative and adjudicative functions, but prosecutorial functions as well. Subsection (a) of 15 U. S. C. § 717s reads as follows:

> "Whenever it shall appear to the Commission that any *person* is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, . . . to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond." (Emphasis added.)

It is clear from this section that the Commission is granted ample authority to proceed against any *person* engaging in practices which violate the Natural Gas Act. It would seem equally clear that if the Commission deemed companies subject to its jurisdiction to be engaging in such practices under claim of authority from the Oklahoma Commission those companies could be forced to defend their conduct in District Court under the provisions of § 717s. But it is a long leap from this provision, which finds a counterpart in other regulatory acts, to the conclusion reached by the District Court here: that the State Commission itself was a "person" for pur-

[10] *Id.*, § 717n (a).
[11] *Id.*, § 717r (b).

poses of § 717s, and might be named a defendant in the District Court for purposes of enjoining enforcement of its orders claimed to violate provisions of the Natural Gas Act. I find no support in the Act for that result.

II

The term "person" is defined in the Act itself, 15 U. S. C. § 717a, as follows:

> " 'Person' includes an individual or a corporation."

Since one would not commonly expect a state corporation commission to be subsumed under the term "individual," it seems reasonable to look at the definition of the word "corporation" to determine whether a state agency is within the class of "persons" which the Federal Power Commission has authority to bring into federal court. But the term "corporation" is defined in 15 U. S. C. § 717a (2) to specifically exclude "municipalities as hereinafter defined." Turning to subsection 3, which defines "municipality," one finds that the term means "a city, county, or other political subdivision or agency of a State." Whatever else this chain of definitions may mean, it must mean that a state agency is *not* included within the definition of the term "corporation."

The District Court in this case conceded that the Oklahoma Corporation Commission was neither an individual nor a corporation within the meaning of the Act, but nevertheless concluded that it was a "person" who could be sued by the Federal Power Commission under § 717s. According to the District Court, the verb "includes" as used in the definition of the word "person" is a verb of "enlargement" and not a verb of "limitation." [12] Therefore, the court reasoned: "Whether the defendant Oklahoma Corporation Commission is a non-

[12] 362 F. Supp. 522, 544.

individual 'person' against which the [Federal Power Commission] may proceed, is to be determined by the 'legislative environment.' " [13]

I do not think the convoluted statutory construction of the District Court withstands analysis. The Federal Power Commission is given statutory authority to sue any "person," defined in the Act to include an "individual" or a "corporation." While use of the word "include" would in some circumstances permit suits against "persons" who could not fairly be classified as either "individuals" or "corporations," the term hardly can be said to cover an agency with corporate characteristics which is nevertheless specifically excluded from the definition of "corporation." Yet this is exactly the result reached by the District Court here: Though the statute excludes "municipalities as hereinafter defined" from the term "corporation," and defines them to mean, *inter alia*, an "agency of a state," the careful process of exclusion and inclusion pursued by Congress is rendered nugatory by the District Court's conclusion that the Oklahoma Commission is a "non-individual 'person.' " [14]

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[13] *Ibid.*

[14] Additional arguments to support the conclusion that state regulatory agencies were not intended to fall within the definition of "person" in the Natural Gas Act can be found by examination of that term's use in other portions of the Act. For example, the very section in which the definition of "person" is found, 15 U. S. C. § 717a, contains an additional definition of "state commission." Furthermore, in the same section, "natural-gas company" is defined to mean a "*person* engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." (Emphasis added.) Obviously, inclusion of a state regulatory body within the definition of "person" in that section would be meaningless.

Section 717r provides that "[a]ny person, State, municipality, or State commission aggrieved by an order issued by the Commission" may apply to the Commission for a rehearing. If the term "person"

The "legislative environment" to which the District Court purported to look in reaching its conclusion not only fails to support the court's interpretation but points in precisely the opposite direction.[15] As indicated earlier in this opinion, the Act was passed in an atmosphere of cooperation between the existing state regulatory agencies and the newly created federal regulatory agency, and was unanimously endorsed by the state regulatory agencies. There is nothing in this environment, and nothing indicated by the District Court, which suggests that the state agencies, by their approval, were consenting to be sued by the FPC in federal courts.

The cases cited by the District Court for its holding with respect to the "legislative environment" of the Natural Gas Act arose out of statutes taxing sales of intoxicating liquors and prohibiting conspiracies and restraint of trade, respectively. In *Ohio* v. *Helvering*, 292 U. S. 360 (1934), the Court held that, under a statute taxing "persons" selling intoxicating liquor, federal tax policy would support a tax on the State acting in a "proprietary" capacity. In *Georgia* v. *Evans*, 316 U. S. 159 (1942), the Court held that a State was included in the definition of "person" for purposes of suing for treble damages under § 7 of the Sherman Act. These cases

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included state regulatory bodies as a matter of course, the duplicate use of "person" and "municipality" or "State commission" would be purely superfluous. Also, 15 U. S. C. § 717t provides that "[a]ny person" who willfully or knowingly violates the provisions of the Natural Gas Act shall be subject to fine or imprisonment. Certainly the word "person" in this subsection would not be held to apply to state regulatory bodies.

[15] Although the District Court stated that the "legislative environment" would be persuasive, it should be noted that the court made no study of the environment of the Natural Gas Act. The only environment examined related to the two acts discussed in the text, *infra*.

are scarcely authority for the proposition that the term "person" in one congressional enactment necessarily means the same thing in another. Neither the Liquor Taxing Act of 1934, § 10 (e), 48 Stat. 315, nor the Sherman Act, § 8, 26 Stat. 210, 15 U. S. C. § 7, defined "person" to include a term such as "corporation" which was then additionally defined to *exclude* the entity sought to be brought within the statute's definition.

My reading of the Natural Gas Act and attendant legislative history affords no basis for the belief that the Federal Power Commission was authorized to bring state commissions into federal court whenever it suspected that state regulatory orders interfered with its own statutory mission. The Federal Power Commission is given full authority to establish rates, to disapprove rates which are considered unreasonable or unjust, and to bring before it alleged violators of the Act. To go further, at least on arguments as tenuous as those offered in support of the result reached by the District Court, and to conclude that Congress intended the Commission to hale state regulatory agencies into federal court whenever it felt their policies were inconsistent with its own, is not only unnecessary to the effectuation of the federal agency's responsibilities, but seriously undermines established notions of comity between state and federal bodies. While there may be many questions of statutory construction which are resolved by three-judge courts which are of no great import to any large segment of the public, this assuredly is not one of them.

No. 73–1080. HOLT ET AL. *v.* YONCE, CHAIRMAN, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL. Affirmed on appeal from D. C. S. C. MR. JUSTICE DOUGLAS dissents from the summary affirmance. Reported below: 370 F. Supp. 374.

No. 73–5972. RAMIREZ ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Affirmed on appeal from D. C. N. D. Ill. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 363 F. Supp. 105.

Appeals Dismissed

No. 73–586. MCMULLAN ET AL. *v.* WOHLGEMUTH, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 453 Pa. 147, 308 A. 2d 888.

No. 73–1114. WINCHESTER *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of San Diego, dismissed for want of substantial federal question.

No. 73–1140. KYSER *v.* BOARD OF ELECTIONS OF CUYAHOGA COUNTY ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 36 Ohio St. 2d 17, 303 N. E. 2d 77.

No. 73–6161. MARTINEZ *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 501 S. W. 2d 130.

No. 73–6133. CLAYTON *v.* WALTER L. COUSE CO. ET AL. Appeal from Sup. Ct. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded. (See also No. 73–5684, *ante*, p. 449.)

No. 73–752. MILES *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Maze*, 414 U. S. 395 (1974). MR. CHIEF JUSTICE BURGER, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN would affirm the judgment. Reported below: 483 F. 2d 1372.

No. 73–5595. RICHARDSON *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the Central District of California so that the judgment of conviction may be vacated as suggested by the Government in the memorandum filed February 25, 1974. Reported below: 484 F. 2d 1046.

No. 73–5717. REESE *v.* U. S. BOARD OF PAROLE ET AL. C. A. D. C. Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States filed February 20, 1974, judgment vacated and case remanded for further consideration in light of the position presently asserted by the Government.

No. 73–5761. OSHER *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Maze*, 414 U. S. 395 (1974). Reported below: 485 F. 2d 573.

*Miscellaneous Orders**

No. A–746. SMITH *v.* UNITED STATES. C. A. 10th Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–820 (73–6388). MCDONALD *v.* TENNESSEE ET AL. C. A. 6th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–843 (73–6142). RADUE *v.* UNITED STATES. C. A. 5th Cir. Application for stay and bail presented to

*For Court's orders prescribing Bankruptcy Rules and Official Bankruptcy Forms, and amendments thereto, and amendments to the Federal Rules of Criminal Procedure, see *post*, pp. 1005–1006.

MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 486 F. 2d 220.

No. A–847. PERSICO *v.* UNITED STATES. C. A. 2d Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. D–23. IN RE DISBARMENT OF LEE. It is ordered that Clifford Taylor Lee of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92, October Term, 1970. WHITCOMB, GOVERNOR OF INDIANA *v.* CHAVIS ET AL., 403 U. S. 124. Motions for modification of costs and to retax costs denied. MR. JUSTICE DOUGLAS would grant the motion to retax costs.

No. 73–29. CORNING GLASS WORKS *v.* BRENNAN, SECRETARY OF LABOR. C. A. 2d Cir.; and

No. 73–695. BRENNAN, SECRETARY OF LABOR *v.* CORNING GLASS WORKS. C. A. 3d Cir. [Certiorari granted, 414 U. S. 1110.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 73–38. UNITED STATES *v.* MARINE BANCORPORATION, INC., ET AL. Appeal from D. C. W. D. Wash. [Probable jurisdiction noted, 414 U. S. 907.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Motion of the Comptroller of the Currency for additional time for oral argument granted and appellees allotted 15 additional minutes for that purpose.

No. 73–362. MORTON, SECRETARY OF THE INTERIOR, ET AL. *v.* MANCARI ET AL.; and

No. 73–364. AMERIND *v.* MANCARI ET AL. Appeals from D. C. N. M. [Probable jurisdiction noted, 414 U. S.

1142, and *ante*, p. 946.] Motion of Montana Inter-Tribal Policy Board et al. for leave to file a brief as *amici curiae* granted.

No. 73–370. NATIONAL LABOR RELATIONS BOARD *v.* FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO. C. A. D. C. Cir. [Certiorari granted, 414 U. S. 1062.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* in support of Heck's, Inc., denied. Motion of Heck's, Inc., for additional time for oral argument, or in the alternative for divided argument, denied.

No. 73–507. HAMLING ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 414 U. S. 1143.] Renewed motion of petitioners for additional time for oral argument denied. Alternative request for divided argument granted.

No. 73–556. FLORIDA POWER & LIGHT CO. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL.; and

No. 73–795. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 414 U. S. 1156.] Motion of the Solicitor General for additional time for oral argument granted and petitioners allotted 15 additional minutes for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 73–640. GEDULDIG, DIRECTOR, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT *v.* AIELLO ET AL. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, 414 U. S. 1110.] Motion of Physicians Forum for leave to file a brief as *amicus curiae* granted.

No. 73–679. WOLFF, WARDEN, ET AL. *v.* MCDONNELL. C. A. 8th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of respondent for appointment of counsel granted. It is ordered that Douglas F. Duchek, Esquire, of Lincoln, Nebraska, be, and he is hereby, appointed to serve as counsel for respondent in this case. Motion of respondent that said Douglas F. Duchek be granted leave to present oral argument *pro hac vice* granted.

No. 73–767. UNITED STATES *v.* CONNECTICUT NATIONAL BANK ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 414 U. S. 1127.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Motion of the Comptroller of the Currency for additional time for oral argument granted and appellees allotted 15 additional minutes for that purpose.

No. 73–841. HOLDER, U. S. DISTRICT JUDGE *v.* BANKS. C. A. 7th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of respondent to supplement record and to defer oral argument denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 73–5280. FULLER *v.* OREGON. Ct. App. Ore. [Certiorari granted, 414 U. S. 1111.] Motion of National Legal Aid & Defender Assn. for leave to dispense with printing its *amicus curiae* brief denied.

No. 73–6240. HOWARD *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 73–296. HUFFMAN ET AL. *v.* PURSUE, LTD. Appeal from D. C. N. D. Ohio. Probable jurisdiction noted and case set for oral argument with No. 73–1119 [immediately *infra*].

No. 73–1119. MTM, INC., ET AL. *v.* BAXLEY, ATTORNEY GENERAL OF ALABAMA, ET AL. Appeal from D. C. N. D. Ala. Probable jurisdiction noted and case set for oral argument with No. 73–296 [immediately *supra*]. Reported below: 365 F. Supp. 1182.

Certiorari Granted

No. 73–5772. FARETTA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also No. 73–6133, *supra.*)

No. 73–547. GUERRA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 496 S. W. 2d 92.

No. 73–702. BURGER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 73–723. ADAMS COUNTY BOARD OF SUPERVISORS ET AL. *v.* HOWARD ET AL.; and

No. 73–770. HOWARD ET AL. *v.* ADAMS COUNTY BOARD OF SUPERVISORS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 978.

No. 73–732. SUTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 484 F. 2d 118.

No. 73–746. LASKER, U. S. DISTRICT JUDGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 481 F. 2d 229.

No. 73–747. AUSTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–757. LEVINE *v.* UNITED STATES; and

No. 73–761. CHIPPAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 73–837. SHELTON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 18 N. C. App. 616, 197 S. E. 2d 588.

No. 73–842. BAILEY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 18 N. C. App. 313, 196 S. E. 2d 556.

No. 73–855. SANTIAGO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 485 F. 2d 483.

No. 73–869. OLYMPIA BREWING CO. *v.* DEPARTMENT OF REVENUE OF OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 266 Ore. 309, 511 P. 2d 837.

No. 73–875. FORGIONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 487 F. 2d 364.

No. 73–881. LINCOLN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 222.

No. 73–885. LUNA *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 513 P. 2d 1399.

No. 73–894. PENNSYLVANIA ET AL. *v.* NASH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 485 F. 2d 679.

No. 73–924. SHELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: See 482 F. 2d 848.

No. 73–991. SUNNYSIDE SCHOOL DISTRICT No. 12 *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–995. SHERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–997. CANDELLA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 1223.

No. 73–1023. EVERETT STEAMSHIP CORP., S/A *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 486 F. 2d 462.

No. 73–1068. JONES *v.* NOR-TEX AGENCIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 1093.

No. 73–1073. WARIN *v.* DIRECTOR, ALCOHOL, TOBACCO AND FIREARMS DIVISION, INTERNAL REVENUE SERVICE. C. A. 6th Cir. Certiorari denied.

No. 73–1089. OSEREDZUK *v.* WARNER CO. C. A. 3d Cir. Certiorari denied. Reported below: 485 F. 2d 680.

No. 73–1099. BASS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 501 S. W. 2d 643.

No. 73–1107. ROSEN, EXECUTIVE DIRECTOR, U. S. CIVIL SERVICE COMMISSION, ET AL. *v.* VAUGHN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 157 U. S. App. D. C. 340 and 368, 484 F. 2d 820 and 1086.

No. 73–1110. STAVOLA *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 73–1141. WHIPPLE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 51 Ala. App. 377, 286 So. 2d 52.

No. 73–1151. ROSIN ET AL. *v.* NEW YORK STOCK EXCHANGE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 179.

No. 73–1158. FLEMING *v.* STATE PERSONNEL BOARD ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 514 P. 2d 1135.

No. 73–1160. TRICO MANUFACTURING CO., INC. *v.* WALKER. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 595.

No. 73–1164. DEERING MILLIKEN RESEARCH CORP. *v.* DUPLAN CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 459.

No. 73–1182. FRANCHISE TAX BOARD OF CALIFORNIA *v.* DANNING. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 84.

No. 73–1183. WEEMS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 73–5457. DUKE ET AL. *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 244.

No. 73–5529. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–5631. HENG AWKAK ROMAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 484 F. 2d 1271.

No. 73–5643. SAWYER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 485 F. 2d 195.

No. 73–5657. DANIELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5669. MCNALLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 485 F. 2d 398.

No. 73–5678. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 484 F. 2d 8.

No. 73–5692. ALVER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 485 F. 2d 684.

No. 73–5711. WOODS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 484 F. 2d 127.

No. 73–5713. CARTHENS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 284 N. C. 111, 199 S. E. 2d 456.

No. 73–5716. LIBERTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5719. THERIAULT *v.* BARTELS ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–5723. GARRISON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5725. DAULTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5729. TYSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5731. MINNAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5736. HENDERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5742. LEGGETT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5745. RYAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 485 F. 2d 295.

No. 73–5750. HARMON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 486 F. 2d 363.

No. 73–5753. LINDSEY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5754. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 725.

No. 73–5756. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 236.

No. 73–5763. DUKES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5764. IN RE SPOTT. Sup. Ct. Ohio. Certiorari denied. Reported below: 34 Ohio St. 2d 241, 298 N. E. 2d 148.

No. 73–5766. STAMPER, AKA STAFFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 485 F. 2d 684.

No. 73–5771. WHITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 204.

No. 73–5783. CLEMENTS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 73–5790. COZAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5791. LENZE *v.* UNITED STATES; and
No. 73–5799. BUSBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 484 F. 2d 994.

No. 73–5801. MARZETTE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 485 F. 2d 207.

No. 73–5830. DEMARRIAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 487 F. 2d 19.

No. 73–5831. FARRIES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5840. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5851. SUMMERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5864. SIERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5871. POMEROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 485 F. 2d 272.

No. 73–5892. HAVERTY *v.* BURDMAN, ACTING SECRETARY, DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Sup. Ct. Wash. Certiorari denied.

No. 73–5897. SUAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 236.

No. 73–5901. PAULDINO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 487 F. 2d 127.

No. 73–5902. JOHNSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1400.

No. 73–5912. BONAPARTE *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 956.

No. 73–5919. BRYANT *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 65.

No. 73–5926. SAGER, AKA MCCLINTOCK *v.* ULIBARRI. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 1406.

No. 73–5928. DAVIS *v.* UNITED STATES; and
No. 73–5959. FLETCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: See 486 F. 2d 1403.

No. 73–5947. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5965. REDDICK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 11 Ill. App. 3d 492, 297 N. E. 2d 360.

No. 73–5966. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 73–5999. ISAACS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6000. DEBENEDICTUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–6001. WALKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 1353.

No. 73–6123. GRIFFIN *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–6136. DAPPER *v.* RICHARDS ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6138. BROWN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 73–6140. HANNAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 73–6143. SULLIVAN *v.* TWOMEY, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 73–6146. BONNETT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 73–6147. JACKSON *v.* ULRICH MANUFACTURING CO. ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–6153. COLLINS *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 112 N. H. 449, 298 A. 2d 742.

No. 73–6178. LEGUM *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No. 73–6202. BILLINGS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dist. Certiorari denied.

No. 73–6206. BRANTLEY *v.* CITY OF DALLAS. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 498 S. W. 2d 452.

No. 72–1437. LYNCH ET AL. *v.* SNEPP ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 472 F. 2d 769.

No. 73–425. NEW YORK *v.* SUTTON ET AL. Ct. App. N. Y. Motion of respondent Peltzman for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 32 N. Y. 2d 923, 300 N. E. 2d 726.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN joins, dissenting.

I dissent because I cannot agree that this case does not merit oral argument. Nor do I agree that if this is the kind of narcotics law enforcement New York wants, that is up to New York. Here the New York Court of Appeals has rested its decision on federal constitutional grounds. Absent full oral argument, I would grant the writ and reverse the judgment of that court essentially for the reasons stated by the three dissenting judges of that court.

No. 73–739. COINER, WARDEN *v.* HART. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. CHIEF JUSTICE BURGER and MR. JUSTICE WHITE would grant certiorari. Reported below: 483 F. 2d 136.

No. 73–810. PENNSYLVANIA *v.* FELTON. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 73–1221. CONTINENTAL CASUALTY CO. *v.* WARD. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 36 Ohio St. 2d 38, 303 N. E. 2d 861.

No. 73–983. WAI KWON YIP ET AL. *v.* UNITED STATES;
No. 73–5430. PUI LEUNG LAM *v.* UNITED STATES; and
No. 73–5714. PUI KAN LAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 1202.

No. 73–1132. ARNOLD ET AL. *v.* TIFFANY ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 216.

No. 73–5734. DUPART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 1393.

No. 73–5788. RAWLINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 5.

No. 73–5815. REID *v.* SLAYTON, PENITENTIARY SUPERINTENDENT; and
No. 73–5821. VISCHIO *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 1401.

No. 73–1122. BUXTON *v.* INTERNATIONAL BUSINESS MACHINES ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 73–5835. SALAZAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 1272.

No. 73–5878. GREEN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 282 So. 2d 461.

No. 73–5908. BURGE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 282 So. 2d 223.

No. 73–988. CARLSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari and reverse.

No. 73–1125. ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL. *v.* CONTAINER CORPORATION OF AMERICA ET AL. C. A. 7th Cir. Motion to defer consideration and certiorari denied. Reported below: 489 F. 2d 825.

No. 73–1159. DUN & BRADSTREET, INC. *v.* HOOD. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari in light of important First and Fourteenth Amendment questions that are raised. See 486 F. 2d 25, 28–30, with which views MR. JUSTICE DOUGLAS disagrees. Reported below: 486 F. 2d 25.

No. 73–5828. PERNELL *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari, vacate the judgment, and remand the case on grounds of mootness. Reported below: 486 F. 2d 301.

No. 73–6124. MCKINLEY *v.* REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL. App. Ct. Ind. Certiorari denied. MR. JUSTICE DOUGLAS would deny certiorari because petition was filed out of time. Reported below: —— Ind. App. ——, 290 N. E. 2d 108.

Rehearing Denied

No. 72–1019. SEA-LAND SERVICES, INC. *v.* GAUDET, ADMINISTRATRIX, 414 U. S. 573;

No. 73–843. LYKES BROTHERS STEAMSHIP CO., INC. *v.* BROWN, 414 U. S. 1158;

No. 73–5484. HOOKS *v.* ROBERTS, WARDEN, 414 U. S. 1163;

No. 73–5624. HAZZARD *v.* SOCIAL SECURITY ADMINISTRATION ET AL., 414 U. S. 1134;

No. 73–5881. TILLEY *v.* NORTH CAROLINA, *ante*, p. 926; and

No. 73–5915. KAPLAN *v.* CONTINENTAL CAN CO., INC., *ante*, p. 927. Petitions for rehearing denied.

No. 72–6891. SHINDER *v.* ESMIOL, 414 U. S. 848. Motion for leave to file petition for rehearing denied.

MARCH 25, 1974

Appeals Dismissed

No. 73–949. MCILVAINE *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 454 Pa. 129, 309 A. 2d 801.

No. 73–1139. FRANKS *v.* WILSON, JUDGE, ET AL. Appeal from D. C. Colo. dismissed for want of jurisdiction. MR. JUSTICE DOUGLAS dissents from dismissal of the appeal.

No. 73–6031. KAPLAN *v.* KAPLAN. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed and Remanded. (See No. 73–5925, *ante*, p. 697.)

Miscellaneous Orders

No. 72–5847. ALEXANDER *v.* GARDNER-DENVER CO., *ante*, p. 36. Motion of petitioner for attorneys' fees as part of taxable costs denied as not appropriate for consideration by this Court. MR. JUSTICE DOUGLAS would refer motion to the District Court for hearing on retaxing costs.

No. 73–191. VILLAGE OF BELLE TERRE ET AL. *v.* BORAAS ET AL. Appeal from C. A. 2d Cir. [Probable jurisdiction noted, 414 U. S. 907.] Motion of New Communities, Inc., for leave to file a brief as *amicus curiae* after argument denied.

No. 73–437. MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 73–457. PUBLIC SERVICE COMMISSION OF NEW YORK *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 73–464. MUNICIPAL DISTRIBUTORS GROUP *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. [Certiorari granted, 414 U. S. 1142.] Motion of the Solicitor General for divided argument granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 73–482. MICHIGAN *v.* TUCKER. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1062.] Motion of Women Lawyers Association of Michigan for leave to file a brief as *amicus curiae* denied.

No. 73–781. SCHERK *v.* ALBERTO-CULVER CO. C. A. 7th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of American Arbitration Assn. for leave to file a brief as *amicus curiae* granted.

No. 73–5936. JEFFERS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR; and

No. 73–6308. HUNTER *v.* NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 73–6119. SAYLES *v.* SIRICA, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Postponed

No. 73–628. ALLENBERG COTTON CO., INC. *v.* PITTMAN. Appeal from Sup. Ct. Miss. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 276 So. 2d 678.

Certiorari Granted

No. 73–1012. GULF OIL CORP. ET AL. *v.* COPP PAVING CO., INC., ET AL. C. A. 9th Cir. Certiorari granted limited to Questions 1(a), (b), and (c) presented in the petition, which read as follows:

"1. With respect to a commodity which is not only made and sold in one state alone but is only salable and usable in that state, does the fact that it is used in an instrumentality of commerce such as a highway supply the necessary requirements, by itself and as a matter of law

"(a) Of the anti-discrimination clause of the Robinson-Patman Act that the discriminatory sale be by a 'person engaged in commerce, in the course of such commerce,' that 'either or any of the purchases involved . . . [be] in commerce,' and that the 'effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce'?

"(b) Of Section 3 of the Clayton Act that the tying conduct be that of a 'person engaged in commerce, in the

course of such commerce' and that 'the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce'?

"(c) Of Section 7 of the Clayton Act that the acquisition by a 'corporation engaged in commerce' be of a corporation 'engaged also in commerce,' and that 'the effect . . . may be substantially to lessen competition, or tend to create a monopoly,' where the acquired corporation sold nothing in commerce and the product it made did not enter commerce?"

Reported below: 487 F. 2d 202.

Certiorari Denied. (See also No. 73–6031, *supra.*)

No. 73–431. BROCCOLINO, JUDGE *v.* MARYLAND COMMISSION ON JUDICIAL DISABILITIES ET AL. Ct. App. Md. Certiorari denied. Reported below: 268 Md. 659, 304 A. 2d 587.

No. 73–779. LEMONAKIS *v.* UNITED STATES; and

No. 73–926. ENTEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 158 U. S. App. D. C. 162, 485 F. 2d 941.

No. 73–832. ROGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 1404.

No. 73–838. KUGLER, ATTORNEY GENERAL OF NEW JERSEY *v.* YOUNG WOMEN'S CHRISTIAN ASSN. OF PRINCETON ET AL. Petition for certiorari before judgment to C. A. 3d Cir. denied. Reported below: See 342 F. Supp. 1048.

No. 73–857. MEDANSKY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 807.

No. 73–859. PETERS *v.* SMITH ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 482 F. 2d 799.

No. 73–864. CAHALANE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 485 F. 2d 679.

No. 73–895. LANDWEHR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 74.

No. 73–902. FLORIDA MINING & MATERIALS CORP., DBA MCCORMICK CONCRETE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 65.

No. 73–914. BAKER ET AL., TRUSTEES IN BANKRUPTCY *v.* INDIANA HARBOR BELT RAILROAD CO. ET AL.; and

No. 73–1201. CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. *v.* BAKER ET AL., TRUSTEES IN BANKRUPTCY. C. A. 3d Cir. Certiorari denied. Reported below: 486 F. 2d 519.

No. 73–935. DRESSEL ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–998. PARKER ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–1047. BOYD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–1137. AMERICAN FIDELITY FIRE INSURANCE CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 34 Cal. App. 3d 51, 109 Cal. Rptr. 545.

No. 73–1167. KEN FOSTER CO., INC. *v.* CHRYSLER LEASING CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–1168. KEITT ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 19 N. C. App. 414, 199 S. E. 2d 23.

No. 73–1171. STANBACK *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 19 N. C. App. 375, 198 S. E. 2d 759.

No. 73–1194. TOYAH INDEPENDENT SCHOOL DISTRICT ET AL. *v.* PECOS-BARSTOW CONSOLIDATED INDEPENDENT SCHOOL DISTRICT ET AL. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. Reported below: 497 S. W. 2d 455.

No. 73–1195. SCHNEIDEMAN, DBA ADEPTCO *v.* RAILWAY EXPRESS AGENCY, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–1198. CAIN ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 73–1202. WILSON ET AL. *v.* MIDWEST FOLDING PRODUCTS MANUFACTURING CORP. ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–1203. HAWAIIAN AIRLINES, INC. *v.* KING, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 73–5727. SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 483 F. 2d 1052.

No. 73–5746. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 486 F. 2d 222.

No. 73–5858. MIRANDA-LOZANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5862. BOWLES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 407, 488 F. 2d 1307.

No. 73–5875. JUAREZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–5885. CLEMENTS *v.* UNITED STATES. C. A. 5th Cir Certiorari denied. Reported below: 484 F. 2d 928.

No. 73–5904. THACKER *v.* BLACKLEDGE, PRISON ADMINISTRATOR. C. A. 4th Cir. Certiorari denied.

No. 73–5907. DOWDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1042.

No. 73–5910. DAVIS *v.* AULT, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 231 Ga. 406, 202 S. E. 2d 53.

No. 73–5932. BRINKLEY *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 73–5953. MCGIFF *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 513 P. 2d 407 and 514 P. 2d 199.

No. 73–5957. WILKINS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 270 Md. 62, 310 A. 2d 39.

No. 73–5964. WHITE ET AL. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 59 Wis. 2d 354, 208 N. W. 2d 321.

No. 73–5967. MCCLINDON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 54 Ill. 2d 546, 301 N. E. 2d 290.

No. 73–5980. DEMARIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–6013. FORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–6073. GERIK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6085. BOOKER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6090. HOWARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6104. CASTELHUN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 73–6139. NICHOLSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1399.

No. 73–6156. OLSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 487 F. 2d 77.

No. 73–6159. HOBSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–6174. JONES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6184. COULVERSON *v.* GRAY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 73–6186. SMILGUS *v.* KIMMEL ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–6189. ASHTON *v.* ANDERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 73–6190. BERGER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–6191. DURAN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 276 So. 2d 254.

No. 73–6198. WESTLAKE *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–6208. TROCODARO *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 36 Ohio App. 2d 1, 301 N. E. 2d 898.

No. 73–6212. JONES *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–6229. SCHLETTE *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 73–6261. STOKES *v.* BLACK, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 73–6269. PRUETT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 510 S. W. 2d 807.

No. 73–665. VOLKSWAGENWERK AKTIENGESELLSCHAFT ET AL. *v.* PRASHAR ET UX. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 480 F. 2d 947.

No. 73–809. ROSSI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Motion to defer consideration and certiorari denied. Reported below: 485 F. 2d 260.

No. 73–916. MARRAPESE *v.* UNITED STATES; and
No. 73–917. ZINNI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 918.

No. 73–1034. KILLE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1082. CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL–CIO, ET AL. *v.* CITY OF CINCINNATI ET AL. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 35 Ohio St. 2d 197, 299 N. E. 2d 686.

No. 73–1084. RYNERSON *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1267. MICHAEL S. *v.* CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1009. HAYDEN, STONE INC. ET AL. *v.* PIANTES ET AL. Sup. Ct. Utah. Certiorari denied as untimely filed. 28 U. S. C. § 2101 (c). Reported below: 30 Utah 2d 110, 514 P. 2d 529.

No. 73–6251. PRUETT *v.* FIRST NATIONAL BANK OF NEVADA. Sup. Ct. Nev. Certiorari denied as untimely filed. 28 U. S. C. § 2101 (c). Reported below: 89 Nev. 442, 514 P. 2d 1186.

No. 73–1169. FLAHERTY ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 255 Ark. 187, 500 S. W. 2d 87.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Petitioners have been convicted of operating a gambling house, in violation of Ark. Stat. Ann. § 41–2001 (1964). 255 Ark. 187, 500 S. W. 2d 87. They challenge the introduction into evidence of tape recordings of telephone conversations which they claim were seized in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.*

A warrant was issued to search petitioner Flaherty's home. After being admitted to the home, state officers placed petitioners under arrest and without petitioners' consent monitored incoming phone calls placing bets for one hour. An officer attached a suction cup containing an induction coil to the telephone and, impersonating

petitioners,[1] recorded the calls being made to the telephone. It is undisputed that the search warrant did not authorize the search and seizure of such calls, and the petitioners did not consent to the seizure of the calls.[2] Petitioners argue that the police intent to record the calls without securing a search warrant is evidenced by the fact the police brought the induction coil and recording equipment with them when executing the warrant.

Petitioners claim that the seizures were made in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, a detailed scheme created by Congress to allow the use of electronic surveillance by the States to intercept wire and oral communications only under stringently defined circumstances, clearly not met here.[3] Under

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[1] Some callers asked to speak to petitioner Whipple and some asked to speak to petitioner Flaherty. The officer who monitored the phone admitted that on some occasions at least he "posed as" and was "impersonating" Flaherty. R. 235–236.

[2] Both the Arkansas Supreme Court and respondent note that when the officers appeared at Flaherty's home with the search warrant, petitioners "invited" them into the home. But there is no suggestion that petitioners, under arrest, consented to the warrantless interception of the telephone calls.

[3] Petitioners claim that the Fourth Amendment was violated when the police took over the phone and seized the incoming conversations without a warrant by impersonating petitioners. There is no dispute that the search warrant did not encompass the seizure of the incoming telephone calls, and the intention of the police to seize the calls when they entered the home is uncontested. There is, however, some question whether this argument was presented to the court below; respondent contends that "this exact argument" was not presented. In any event, the Fourth Amendment issue would necessarily be implicated in consideration of the Title III issue, properly raised by petitioners. See *infra*.

Indeed, Congress has ample power to provide protection for the privacy of telephonic communications more comprehensive than that provided by the Fourth and Fourteenth Amendments. This power reaches not only interstate but also intrastate telephonic communi-

Title III, there must be a judicial order to intercept conversations; the application for the order must have been authorized by the principal prosecuting attorney of the State or a political subdivision, 18 U. S. C. § 2516 (2); must contain carefully specified information, § 2518 (1); and the judge before issuing the order must make detailed findings of fact, § 2518 (3), and include certain information in the order, § 2518 (4).

The Arkansas Supreme Court suggested that the calls in this case were not "intercepted" within the meaning of the statute, since the police officer merely answered the telephone when it rang. The contention is without merit. Title III defines "intercept" broadly as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U. S. C. § 2510 (4). The contents of the communications in this case were clearly acquired by use of electronic and mechanical devices—an induction coil was affixed to the telephone and the conversations thereby monitored were fed into a tape recorder.

That an "interception" can occur without overhearing a conversation being carried between two other persons is made clear by 18 U. S. C. § 2511 (2)(c). This section comprehends that a party to a communication can "intercept" it within the meaning of the statute; it provides, however, that such interception is not unlawful within the meaning of Title III:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party

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cations. See *Weiss* v. *United States*, 308 U. S. 321, 327. And it enables Congress to require suppression of evidence in both federal and state proceedings. See *Nardone* v. *United States*, 302 U. S. 379; *Lee* v. *Florida*, 392 U. S. 378.

to the communication or one of the parties to the communication has given prior consent to such interception." [4] 18 U. S. C. § 2511 (2)(c).

In any event, the Arkansas Supreme Court did not rely on the "interception" concept in disposing of petitioners' claim; it placed express reliance on the "party" exception contained in § 2511 (2)(c), *supra*. Noting that the section provides an exception to the ban on warrantless interceptions for a party to the communication, the court reasoned that the police officer, impersonating petitioners, was a party to the communications and thus could record them without a warrant.

We must, however, interpret § 2511 (2)(c) in light of existing constitutional standards. See S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968). The party exception and the consent-of-a-party exception must have their justification in the decisions of this Court. "Bugged informer" cases have permitted the introduction of transmitted or recorded evidence, seized without a warrant, where the transmission or recording has been with the consent of a party to an oral communication. See, *e. g., Lopez* v. *United States*, 373 U. S. 427; *United States* v. *White*, 401 U. S. 745. The Court has also permitted telephonic conversations to be overheard with the consent of a party to the conversation. See *Rathbun* v. *United States*, 355 U. S. 107 (no "interception" within meaning of § 605 of Federal Communications Act of 1934 when party to conversation allowed police to listen on extension telephone).

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[4] *United States* v. *Pasha*, 332 F. 2d 193, and *Rathbun* v. *United States*, 355 U. S. 107, involved "interceptions" under § 605 of the Federal Communications Act of 1934, which did not have the broad express definition contained in Title III. *State* v. *Vizzini*, 115 N. J. Super. 97, 278 A. 2d 235, also relied on by the Arkansas court, mistakenly interpreted Title III in light of § 605 precedent.

But these cases do not reach the instant case. The principle underlying them is that when one reveals information to an individual, one takes the risk that one's confidence in that individual might be misplaced.[5] The individual might be a government informer or agent, or might later reveal one's confidences to others. When he talks, it is only the trust placed in him that is breached. But here the callers were deceived as to the identities of the individuals with whom they were speaking. Trust was not misplaced in petitioner Flaherty, who then revealed information or allowed the police to listen in; trust was misplaced in the assumption that an individual identifying himself as Flaherty was in fact the person known to the callers as Flaherty.

Allowing the government to practice deception in this case carries the seeds of destroying a substantial part of the congressional plan in Title III and its constitutional underpinnings. By impersonation, the police could engage in conversations with unsuspecting callers, becoming technical "parties" to the conversations. In the instant case, a standard warrant to search a home for physical evidence was transmuted into the power to search and seize all incoming calls without any of the protections inherent in Title III's requirements. But the principle would seemingly extend beyond this situation, even to the situation where the police intercepted calls before they reached a recipient's telephone and mimicked the intended recipient's voice, inducing a conversation to which the police were "parties." It is unthinkable that a carefully drawn legislative plan can

[5] See *United States* v. *White*, 401 U. S. 745, 752; *Lopez* v. *United States*, 373 U. S. 427, 438; *Rathbun* v. *United States*, *supra*, at 111. The risk is assumed when one speaks to a trusted acquaintance, cf. *Hoffa* v. *United States*, 385 U. S. 293, 302, and perhaps even more clearly when one knowingly and willingly confides in a stranger, cf. *Lewis* v. *United States*, 385 U. S. 206, 210.

consistently with constitutional principles be frustrated in a manner leaving no legal protection for the privacy and security of telephone conversations as long as callers can be successfully deceived. We have not yet reached the point where the people must use secret passwords to establish their identities when communicating by telephone.

I would grant certiorari and reverse the judgment below.

No. 73–5920. BOOTH *v.* MARYLAND. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5961. ROSS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 11 Ill. App. 3d 650, 297 N. E. 2d 328.

No. 73–5988. KIMES *v.* WOLFF. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6200. SCARBOROUGH *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 110 Ariz. 1, 514 P. 2d 997.

No. 73–1196. STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS ET AL. *v.* UNITED PARCEL SERVICE. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 270 Md. 202, 311 A. 2d 220.

No. 73–6203. FOSTER *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion to defer consideration denied. Petition

for writ of certiorari denied as untimely filed. 28 U. S. C. § 2101 (c). Reported below: 42 App. Div. 2d 691, 346 N. Y. S. 2d 787.

Rehearing Denied

No. 73–976. JOHNSON *v.* WILMER ET AL., *ante*, p. 911; and

No. 73–5942. BRONSON *v.* BRONSON, *ante*, p. 928. Petitions for rehearing denied.

BANKRUPTCY RULES AND OFFICIAL BANKRUPTCY FORMS

EFFECTIVE JULY 1, 1974

The Bankruptcy Rules and Official Bankruptcy Forms were prescribed by the Supreme Court of the United States on March 18, 1974, pursuant to 28 U. S. C. § 2075, and were reported to the Congress by THE CHIEF JUSTICE on the same date. For letter of transmittal, see *post*, p. 1004. The Judicial Conference report referred to in that letter is not reproduced herein. These rules and forms became effective on July 1, 1974, as provided in paragraph 2 of the Court's order, *post*, p. 1005.

For earlier publication of Bankruptcy Rules and Forms, see, *e. g.*, 411 U. S. 989.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 18, 1974

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court, I have the honor to submit to Congress the Rules and Official Forms governing proceedings under Chapter XI of the Bankruptcy Act, together with an amendment to Subdivision 14 of Official Bankruptcy Form 7 prescribed by the Court by Order of April 24, 1973, and Amendment to Rules 41 (a) and 50 of the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court, pursuant to Title 28, Section 2075, and Title 18 United States Code, Section 3771. MR. JUSTICE DOUGLAS dissents from the adoption of Chapter XI of the Bankruptcy Act.

Accompanying these rules and forms is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes which were submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER,
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 18, 1974

ORDERED:

1. That the rules and forms as approved by the Judicial Conference of the United States and annexed hereto, to be known as the Chapter XI Rules and Official Chapter XI Forms, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the forms of process, writs, pleadings and motions and the practice and procedure under Chapter XI of the Bankruptcy Act, in the proceedings and to the extent set forth therein, in the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands.

[See *infra*, pp. 1011–1053.]

2. That the aforementioned Chapter XI Rules and Official Chapter XI Forms shall take effect on July 1, 1974, and shall be applicable to proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That General Order in Bankruptcy 48 and Official Forms in Bankruptcy 48 to 52 inclusive, heretofore prescribed by this Court be, and they hereby are, abrogated, effective July 1, 1974.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned new Chapter XI Rules and Official Chapter XI Forms to the Congress in accordance with the provisions of Title 28, U. S. C. § 2075.

MR. JUSTICE DOUGLAS.

I dissent from the transmittal to Congress of these Chapter XI Bankruptcy Rules. With all respect, we have no expertise in this area, very few bankruptcy cases reaching us. Matters of this kind should therefore not bear our imprimatur but only that of judges who are active in the administration of the Bankruptcy Act.

ORDERED:

1. That subdivision 14 of Official Bankruptcy Form 7 prescribed by this Court by Order entered April 24, 1973, be, and it hereby is, amended, effective July 1, 1974, to read as follows:

[See *infra*, p. 1055.]

2. That subdivision (a) of Rule 41 and the first paragraph of Rule 50 of the Federal Rules of Criminal Procedure be, and they hereby are, amended, effective July 1, 1974, to read as follows:

[See *infra*, p. 1057.]

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the foregoing amendments to Official Bankruptcy Form 7 and Rules 41 and 50 of the Federal Rules of Criminal Procedure to the Congress in accordance with Title 28 U. S. C. § 2075 and Title 18, U. S. C. § 3771.

RULES OF BANKRUPTCY PROCEDURE

TITLE V
CHAPTER XI RULES

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TITLE V
CHAPTER XI RULES

Rule 11–1. Scope of Chapter XI rules and forms; short title.

The rules and forms in this Title V govern the procedure in courts of bankruptcy in cases under Chapter XI of the Bankruptcy Act. These rules may be known and cited as the Chapter XI Rules. These forms may be known and cited as the Official Chapter XI Forms.

Rule 11–2. Meanings of words in the Bankruptcy Rules when applicable in a Chapter XI case.

The following words and phrases used in the Bankruptcy Rules made applicable in Chapter XI cases by these rules have the meanings herein indicated, unless they are inconsistent with the context:

(1) "Bankrupt" means "debtor."

(2) "Bankruptcy" or "bankruptcy case" means "Chapter XI case."

(3) "Receiver," "trustee," "receiver in bankruptcy," or "trustee in bankruptcy" means the "receiver," "trustee," or "debtor continued in possession" in the Chapter XI case.

Rule 11–3. Commencement of Chapter XI case.

(*a*) *Method of commencement.*—A Chapter XI case is commenced by the filing of a petition with the court by a person seeking relief under Chapter XI of the Act.

(*b*) *When case may be commenced.*—The petition under Chapter XI may be an original petition or it may be filed in a bankruptcy, Chapter XII, or Chapter XIII case.

Rule 11–4. Chapter XI cases originally commenced under another chapter of the Act.

When a case commenced under another chapter of the Act proceeds under Chapter XI, the Chapter XI case shall be deemed to have been originally commenced as of the date of the filing of the first petition initiating a case under the Act.

Rule 11–5. Reference of cases; withdrawal of reference and assignment.

Bankruptcy Rule 102 applies in Chapter XI cases.

Rule 11–6. Original petition.

An original petition under Chapter XI of the Act shall conform substantially to Official Form No. 11–F1. An original and 4 copies of the petition shall be filed, unless a different number of copies is required by local rule. The clerk shall transmit one copy to the District Director of Internal Revenue for the district in which the case is filed, and one copy to the Secretary of the Treasury and, if the debtor is a corporation, one copy to the Securities and Exchange Commission at Washington, District of Columbia.

Rule 11–7. Petition in pending case.

If a bankruptcy case or a case under Chapter XII or XIII is pending by or against the debtor, any petition under Chapter XI shall be filed therein and may be filed before or after adjudication. Such petition shall conform substantially to Official Form No. 11–F2. The number and distribution of copies shall be as specified in Rule 11–6. The filing of the petition shall act as a stay of adjudication and of administration of an estate in bankruptcy. The court may, for cause shown, terminate, annul, modify, or condition the stay.

Rule 11–8. Partnership petition.

A petition may be filed pursuant to Rule 11–6 or 11–7 by all the general partners on behalf of the partnership.

Rule 11–9. Caption of petition.

Bankruptcy Rule 106 applies in Chapter XI cases.

Rule 11–10. Filing fees.

Every petition filed pursuant to Rule 11–6 shall be accompanied by the prescribed filing fees.

Rule 11–11. Schedules, statement of affairs, and statement of executory contracts.

(*a*) *Schedules and statements required.*—The debtor shall file with the court schedules of all his debts and all his property, a statement of his affairs, and a statement of his executory contracts, prepared by him in the manner prescribed by Official Forms No. 11–F5 and either No. 11–F6 or No. 11–F7, whichever is appropriate. The number of copies of the schedules and statements shall correspond to the number of copies of the petition required by these rules.

(*b*) *Time limits.*—Except as otherwise provided herein, the schedules and statements, if not previously filed in a pending bankruptcy or Chapter XII case, shall be filed with the petition. A petition shall nevertheless be accepted by the clerk if accompanied by a list of all the debtor's creditors and their addresses, and the schedules and statements may be filed within 15 days thereafter in such case. On application, the court may grant up to 30 additional days for the filing of schedules and the statements; any further extension may be granted only for cause shown and on such notice as the court may direct.

(*c*) *Partnership.*—If the debtor is a partnership, the general partners shall prepare and file the schedules of the debts and property, statement of affairs, and statement of executory contracts of the partnership.

(*d*) *Interests acquired or arising after petition.*—Bankruptcy Rule 108 (e) applies in Chapter XI cases except that the supplemental schedule need not be filed with

respect to property or interests acquired after confirmation of a plan.

Rule 11–12. Verification and amendment of petition and accompanying papers.

Bankruptcy Rules 109 and 110 apply in Chapter XI cases to petitions, schedules, statements of affairs, statements of executory contracts, and amendments thereto.

Rule 11–13. Venue and transfer.

(*a*) *Proper venue.*

(*1*) *General venue requirement.*—Bankruptcy Rule 116 (a)(1) and (2) apply to a petition filed pursuant to Rule 11–6. A petition filed pursuant to Rule 11–7 shall be filed with the court in which the bankruptcy, Chapter XII, or Chapter XIII case is pending.

(*2*) *Partner with partnership or copartner.*—Notwithstanding the foregoing: (A) a petition commencing a Chapter XI case may be filed by a general partner in a district where a petition under the Act by or against a partnership is pending; (B) a petition commencing a Chapter XI case may be filed by a partnership or by any other general partner or any combination of the partnership and the general partners in a district where a petition under the Act by or against a general partner is pending.

(*3*) *Affiliate.*—Notwithstanding the foregoing, a petition commencing a Chapter XI case may be filed by an affiliate of a debtor or bankrupt in a district where a petition under the Act by or against the debtor or bankrupt is pending.

(*b*) *Transfer of cases; dismissal or retention when venue improper; reference of transferred cases.*—Bankruptcy Rule 116 (b) and (d) apply in Chapter XI cases.

(*c*) *Procedure when petitions involving the same debtor or related debtors are filed in different courts.*—Bankruptcy Rule 116 (c) applies in Chapter XI cases.

Rule 11–14. Joint administration of cases pending in same court.

Bankruptcy Rules 117 (b) and (c) apply in Chapter XI cases.

Rule 11–15. Conversion to Chapter X.

(*a*) *Motion by debtor.*—A debtor eligible for relief under Chapter X of the Act may, at any time, make a motion to have the case proceed under such Chapter.

(*b*) *Motion by party in interest other than debtor.*—At any time until 120 days after the first date set for the first meeting of creditors in the Chapter XI case, a motion may be made by the Securities and Exchange Commission or other party in interest to have the case proceed under Chapter X of the Act. The court may, for cause shown, extend the time for making such motion.

(*c*) *Form of motion; answer.*—A motion made under this rule shall state why relief under Chapter XI of the Act would not be adequate and shall also conform substantially to Official Form No. 10–1. On the making of such motion, the court shall fix a date on at least 20 days' notice to the parties specified in subdivision (d) of this rule for the filing of answers controverting the allegations of the motion, which date shall be not less than 10 days before the date set for the hearing under subdivision (d) of this rule.

(*d*) *Hearing and order.*—After hearing, on notice to the debtor, the Securities and Exchange Commission, indenture trustees, creditors, and stockholders, and such other persons as the court may direct, the court shall, if it finds that the case may properly proceed under Chapter X of the Act, grant the motion and order that the case proceed under that Chapter. The granting of the motion shall be deemed to constitute approval of a petition under Chapter X.

Rule 11–16. Death or insanity of debtor.

In the event of death or insanity of the debtor, a Chapter XI case may be dismissed, or if further administration is feasible and in the best interest of the parties, the estate may be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred.

Rule 11–17. Debtor involved in foreign proceeding.

Bankruptcy Rule 119 applies in Chapter XI cases.

Rule 11–18. Appointment of receiver; continuance of trustee or debtor in possession; removal.

(*a*) *Trustee.*—When a petition is filed under Rule 11–7 after the qualification of a trustee in bankruptcy in the pending bankruptcy case, the court shall continue the trustee in possession.

(*b*) *Retention of debtor in possession; appointment of receiver.*—On the filing of a petition under Rule 11–6 or 11–7, if no trustee in bankruptcy has previously qualified, the debtor shall continue in possession. On application of any party in interest, the court may, for cause shown, appoint a receiver to take charge of the property and operate the business of the debtor.

(*c*) *Notice to receiver of his appointment; qualification.*—The court shall immediately notify the receiver of his appointment, inform him as to how he may qualify, and require him forthwith to notify the court of his acceptance or rejection of the office. A receiver shall qualify as provided in Rule 11–20.

(*d*) *Eligibility.*—Only a person who is eligible to be a trustee under Bankruptcy Rule 209 (d) may be appointed a receiver.

(*e*) *Removal and substitution of receiver.*—The court may at any time remove the receiver and either appoint a successor or restore the debtor to possession.

(*f*) *Removal of trustee for cause.*—On motion of any party in interest or on the court's own initiative and

after hearing on notice, the court may remove a trustee for cause and either appoint a receiver or designate the debtor as debtor in possession.

(*g*) *Substitution of successor.*—When a trustee or receiver dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a Chapter XI case, his successor is automatically substituted as a party in any pending action, proceeding, or matter without abatement.

Rule 11–19. Receivers for estates when joint administration ordered.

(*a*) *Appointment of receivers for estates being jointly administered.*—If the court orders a joint administration of 2 or more estates pursuant to Rule 11–14, it may appoint one or more common receivers or separate receivers for the estates being jointly administered. Common receivers shall not be appointed unless the court is satisfied that parties in interest in the different estates will not be prejudiced by conflicts of interest of such receivers.

(*b*) *Separate accounts.*—The receiver or receivers of estates being jointly administered shall nevertheless keep separate accounts of the property of each estate.

Rule 11–20. Qualification by receiver and disbursing agent; indemnity; bonds; evidence.

(*a*) *Qualifying bond or security.*—Except as provided hereinafter, every receiver within 5 days after his appointment and every person specially appointed as disbursing agent within the time fixed by the court shall, before entering on the performance of his official duties, qualify by filing a bond in favor of the United States conditioned on the faithful performance of his official duties or by giving such other security as may be approved by the court.

(*b*) *Blanket bond.*—The court may authorize a blanket bond in favor of the United States conditioned on the

faithful performance of official duties by a receiver in more than one case or by more than one receiver.

(*c*) *Qualification by filing acceptance.*—A receiver for whom a blanket bond has been filed pursuant to subdivision (b) of this rule shall qualify by filing his acceptance of his appointment in lieu of the bond.

(*d*) *Indemnification.*—The court may, after hearing on notice to the debtor and such other persons as the court may direct, order the debtor to indemnify or otherwise protect the estate against subsequent loss thereto or diminution thereof until the entry, if any, of an order of adjudication.

(*e*) *Amount of bond and sufficiency of surety; filing of bond; proceeding on bond.*—Bankruptcy Rule 212 (e) and (f) apply to the bonds of trustees, receivers, and persons specially appointed as disbursing agents in Chapter XI cases.

(*f*) *Evidence of qualification; debtor continued in possession.*—A certified copy of the order approving the bond or other security given by a receiver under subdivision (a) or of his acceptance filed under subdivision (c) of this rule shall constitute conclusive evidence of his appointment and qualification. Whenever evidence is required that a debtor is a debtor in possession, the court may so certify and the certificate shall constitute conclusive evidence of that fact.

Rule 11–21. Limitation on appointment of receivers.

Bankruptcy Rule 213 applies in Chapter XI cases.

Rule 11–22. Employment of attorneys and accountants.

Bankruptcy Rule 215 applies in Chapter XI cases to the employment of attorneys and accountants for a trustee, receiver, debtor in possession, or creditors' committee selected pursuant to Rule 11–27.

Rule 11–23. Authorization of trustee, receiver, or debtor in possession to conduct business of debtor.

The court may authorize the trustee, receiver, or debtor

in possession to conduct the business and manage the property of the debtor for such time and on such conditions as may be in the best interest of the estate.

Rule 11–24. Notice to parties in interest and the United States.

(*a*) *Ten-day notices to parties in interest.*—Except as provided hereinafter, the court shall give the trustee or receiver, the debtor, and all creditors, including secured creditors, at least 10 days' notice by mail of (1) a meeting of creditors; (2) any proposed sale of property, other than in the ordinary course of business, including the time and place of any public sale, unless the court on cause shown shortens the time or orders a sale without notice; (3) the hearing on the approval of a compromise or settlement of a controversy, unless the court on cause shown directs that notice not be sent; (4) the time for filing objections to confirmation; (5) the hearing to consider confirmation of a plan; (6) the time fixed to reject a proposed modification of a plan when notice is required by Rule 11–39; and (7) the hearing on an application for allowances for compensation or reimbursement of expenses. The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold. The notice of a hearing on an application for compensation or reimbursement of expenses shall specify the applicant and the amount requested.

(*b*) *Other notices to parties in interest.*—The court shall give notice by mail to the trustee or receiver, the debtor, and all creditors, including secured creditors, of (1) dismissal of the case pursuant to Rule 11–42; (2) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c (2) of the Act as provided in Rule 11–48; and (3) entry of an order confirming a plan pursuant to Rule 11–38.

(*c*) *Addresses of notices.*—Bankruptcy Rule 203 (e) applies in Chapter XI cases.

(*d*) *Notices to creditors' committee.*—Copies of all notices required to be mailed to creditors under these rules shall be mailed to the creditors' committee selected pursuant to Rule 11–29, if any. Notwithstanding the foregoing subdivisions, if a creditors' committee has been selected, the court may order that notices required by clauses (2), (3), and (7) of subdivision (a) be mailed only to the committee or to its authorized agent and to the creditors who file with the court a request that all notices under these clauses be mailed to them.

(*e*) *Notices to the United States.*—Copies of all notices required to be mailed to creditors under these rules shall be mailed to the United States in the manner provided in Bankruptcy Rule 203 (g).

(*f*) *Notice by publication.*—Bankruptcy Rule 203 (h) applies in Chapter XI cases.

(*g*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 11–9.

Rule 11–25. Meetings of creditors.

(*a*) *First meeting.*

(*1*) *Date and place.*—The first meeting of creditors shall be held not less than 20 nor more than 40 days after the filing of a petition commencing a Chapter XI case but if there is an application or motion to dismiss or to convert to bankruptcy pursuant to Rule 11–42 or an appeal from or a motion to vacate an order entered under that rule, the court may delay fixing a date for such meeting. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

(*2*) *Agenda.*—The bankruptcy judge shall preside over the transaction of all business at the first meeting of creditors, including the examination of the debtor. He shall, when necessary, determine which claims are unsecured and which are secured and to what extent, which

claims are entitled to vote at the meeting, which claims have voted for acceptance of a plan, shall conduct the election, if one is held, of a standby trustee and, if one is held, of a creditors' committee, and may fix a time for filing a plan if one has not been filed.

(*b*) *Special meetings.*—The court may call a special meeting of creditors on application or on its own initiative.

Rule 11–26. Examination.

Bankruptcy Rule 205 applies in Chapter XI cases, except that the scope of examination referred to in subdivision (d) thereof may also relate to the liabilities and financial condition of the debtor, the operation of his business and the desirability of the continuance thereof, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

Rule 11–27. Selection of creditors' committee and standby trustee.

(*a*) *Election or appointment of creditors' committee and election of standby trustee.*—At the first meeting of creditors, creditors may elect a committee of not less than 3 nor more than 11 creditors if none has previously been elected under Bankruptcy Rule 214 and, if a trustee has not previously been elected or appointed, may elect a standby trustee. If creditors fail to elect a committee and if it is in the best interest of the estate, the court may appoint a representative committee from among creditors willing to serve.

(*b*) *Voting at creditors' meetings.*—Bankruptcy Rule 207 applies in Chapter XI cases to the voting at creditors' meetings for a standby trustee and a creditors' committee.

Rule 11–28. Solicitation and voting of proxies.

Bankruptcy Rule 208 applies in Chapter XI cases, except that the rule does not apply to the solicitation of the acceptance of a plan, or to the related proof of claim that does not contain a proxy, and except that for the purpose of this rule "$500" in Bankruptcy Rule 208 (b)(1)(C) is changed to "$1,000."

Rule 11–29. Creditors' committee.

(*a*) *Functions.*—The committee selected pursuant to Rule 11–27 may consult with the trustee, receiver, or debtor in possession in connection with the administration of the estate, examine into the conduct of the debtor's affairs and the causes of his insolvency or inability to pay his debts as they mature, consider whether the proposed plan is for the best interests of creditors and is feasible, negotiate with the debtor concerning the terms of the proposed plan, advise the creditors of its recommendations with respect to the proposed plan, report to the creditors concerning the progress of the case, collect and file with the court acceptances of the proposed plan, and perform such other services as may be in the interest of creditors.

(*b*) *Employment of attorneys, accountants, and agents.*—A committee selected pursuant to Rule 11–27 may employ such attorneys, accountants, and other agents as may be necessary to assist in the performance of its functions.

(*c*) *Reimbursement of expenses; compensation.*—Expenses of the committee, including compensation for attorneys, accountants, and other agents employed under subdivision (b) of this rule, whether incurred before or after the filing of the petition, shall be allowed in the event of confirmation as an expense of administration to the extent deemed reasonable and necessary by the court, and may be allowed when there is no confirmation. Such expense incurred by the committee before its se-

lection pursuant to Rule 11–27 shall not be disallowed because of a change in the committee's composition, provided a majority of the committee when it incurred the expense continues as members of the selected committee. An application by an attorney, accountant, or other agent for compensation or reimbursement of expenses or an application by a committee for reimbursement of expenses paid as compensation, shall be governed by Bankruptcy Rule 219. Expenses deemed reasonable and necessary by the court incurred by the committee other than for compensation of an attorney, accountant, or other agent or incurred by any selected member of the committee in connection with services performed as a member after the filing of the petition, may also be allowed as an expense of administration after hearing on such notice to such persons as the court may direct, whether or not a plan is confirmed. No member of the committee may be compensated for services rendered by him in the case.

Rule 11–30. Duty of trustee, receiver, or debtor in possession to keep records, make reports, and furnish information.

Bankruptcy Rule 218 applies in Chapter XI cases, except that (1) the written report of the financial condition of the estate shall be made by the trustee, receiver, or debtor in possession within a month after the filing of a petition commencing a Chapter XI case and every month thereafter, and shall include a statement of the operation of the business for the preceding month and, if payments are made to employees, the amounts of deductions for withholding and social security taxes and the place where such amounts are deposited and, (2) the court may excuse the filing of a final report and account by the trustee or receiver, and a debtor in possession need not file a final report and account unless ordered to do so by the court.

Rule 11–31. Compensation for services and reimbursement of expenses.

Bankruptcy Rule 219 applies in Chapter XI cases. Reasonable compensation for services beneficial to the estate and reimbursement of necessary expenses may be allowed to the attorney for the debtor and debtor in possession whether or not a plan is confirmed.

Rule 11–32. Examination of debtor's transactions with his attorney.

Bankruptcy Rule 220 applies in Chapter XI cases.

Rule 11–33. Claims.

(*a*) *Form and content of proof of claim; evidentiary effect.*—Bankruptcy Rule 301 applies in Chapter XI cases.

(*b*) *Filing proof of claim.*

(*1*) *Manner and place of filing.*—Bankruptcy Rule 302 (a), (b), (c) and (d) apply in Chapter XI cases. When the petition is filed pursuant to Rule 11–7, all claims filed in the pending bankruptcy case shall be deemed filed in the Chapter XI case.

(*2*) *Time for filing.*—A claim, including an amendment thereof, must be filed before confirmation of the plan except as follows:

(A) if scheduled by the debtor as undisputed, not contingent, and liquidated as to amount, a claim or an amendment to a claim may be filed within 30 days after the date of mailing notice of confirmation to creditors but in such event shall not be allowed for an amount in excess of that set forth in the schedule; and

(B) a claim arising from the rejection of an executory contract of the debtor, and a post-petition claim allowed to be filed under paragraph (3) of this subdivision, may be filed within such time as the court may direct.

(C) Bankruptcy Rule 302 (e)(3) applies in Chapter XI cases.

(3) *Post-petition tax claims.*—Notwithstanding paragraph (2) of this subdivision, the court may, at any time while a case is pending, permit the filing of a proof of claim for the following:

(A) Claims for taxes owing to the United States, a state, or any subdivision thereof, at the time of the filing of the petition under Rule 11–6 or 11–7 which had not been assessed prior to the date of confirmation of the plan, but which are assessed within one year after the date of the filing of the petition.

(B) Claims for taxes owing to the United States, a state, or any subdivision thereof, after the filing of the petition under Rule 11–6 or 11–7 and which are assessed while the case is pending.

(c) *Filing of tax and wage claims by debtor.*—Bankruptcy Rule 303 applies in Chapter XI cases.

(d) *Claim by codebtor.*—A person who is or may be liable with the debtor, or who has secured a creditor of the debtor, may, if the creditor fails to file his proof of claim on or before the first date set for the first meeting of creditors, execute and file a proof of claim pursuant to this rule, including an acceptance of the plan or any modification thereof, in the name of the creditor, if known, or if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. The creditor may nonetheless file a proof of claim pursuant to subdivisions (a) and (b) of this rule and, at any time before the court determines that the plan or any modification thereof has been accepted by the number and amount of creditors required for confirmation, an acceptance or revocation of the acceptance by such person, if any, of the plan, or any modification thereof. Such proof of claim and such revocation of acceptance shall supersede the proof of claim and acceptance filed pursuant to the first sentence of this subdivision. In the event the creditor files a claim and does not file a

revocation of acceptance, the acceptance filed by the codebtor shall be deemed made on the creditor's behalf.

(*e*) *Objections to and allowance of claims; valuation of security.*—Bankruptcy Rule 306 applies in Chapter XI cases.

(*f*) *Reconsideration of claims.*—Bankruptcy Rule 307 applies in Chapter XI cases.

Rule 11–34. Withdrawal of acceptance or claim.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding, or the creditor has accepted the plan or otherwise has participated significantly in the case, he may not withdraw the claim save on application or motion with notice to the trustee, receiver, or debtor in possession, and on order of the court containing such terms and conditions as the court deems proper. Unless the court directs otherwise, withdrawal of a claim shall constitute withdrawal of any related acceptance.

Rule 11–35. Distribution; undistributed consideration; unclaimed funds.

(*a*) *Distributions.*—Except as otherwise provided in the plan, Bankruptcy Rule 308 applies in Chapter XI cases to cash distributions made under a plan. Except as otherwise provided in the plan or ordered by the court, consideration other than cash distributed under the plan shall be issued in the name of the creditor entitled thereto and, if a power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Bankruptcy Rule 910, such consideration shall be transmitted to such other person.

(*b*) *Undistributed consideration.*—Except as provided in subdivision (c) of this rule, or as otherwise ordered by the court, the disbursing agent shall return to the debtor or to such other person as may be designated by

the court any money or other deposited consideration in his possession not distributed under the plan.

(*c*) *Unclaimed Funds.*—Sixty days after any distribution, the disbursing agent shall stop payment on all checks then unpaid. Bankruptcy Rule 310 shall otherwise apply in Chapter XI cases.

Rule 11–36. Filing of plan; transmission to creditors; adjourned meeting.

(*a*) *Filing of plan; number of copies.*—The debtor may file a plan with his petition or thereafter, but not later than a time fixed by the court. The debtor, if required by the court, shall promptly furnish a sufficient number of copies of the plan to enable the court to transmit them as provided in subdivision (b) of this rule.

(*b*) *Transmittal of plan to creditors; adjourned meetings.*—If a plan is filed prior to mailing of notice of the first meeting of creditors, a copy of the plan shall accompany the notice. If the debtor has not filed a plan prior to the first date set for the first meeting of creditors, the court, at the first meeting or thereafter, shall fix a time for filing a plan. If a plan is not filed prior to the mailing of notice of the first meeting of creditors, the court, at the first meeting, shall adjourn the meeting to a date certain. When a plan is filed, a copy thereof and notice of a subsequent adjourned meeting date shall be mailed to the persons specified in Rule 11–24 (a) at least 10 days prior to such date. The court may adjourn a first meeting of creditors from time to time to dates certain.

Rule 11–37. Acceptance or rejection of plans.

(*a*) *Time for acceptance or rejection.*—At any time prior to the conclusion of the first meeting of creditors, each creditor filing a claim may file with the court his acceptance of the plan. A creditor who files a claim but who fails to file an acceptance within the time prescribed, shall be deemed to have rejected the plan. Acceptances may be obtained before or after the filing of the petition

and may be filed with the court on behalf of the accepting creditor.

(*b*) *Form of acceptance.*—An acceptance of a plan shall be in writing, shall identify the plan accepted, and shall be signed by the creditor.

(*c*) *Temporary allowance.*—Notwithstanding objection to a claim the court may temporarily allow it to such extent as to the court seems proper for the purpose of accepting a plan.

Rule 11–38. Deposit; confirmation of plan; evidence of title.

(*a*) *Deposit.*—At the first meeting of creditors, after a plan has been accepted and before confirmation, the court shall (1) designate as disbursing agent the trustee or receiver, if any, otherwise the debtor in possession or a person specially appointed, to distribute, subject to the control of the court, the consideration, if any, to be deposited by the debtor; and (2) fix a time before confirmation within which the debtor shall deposit with the disbursing agent, or in such place and on such terms as the court may approve, the money necessary to pay all priority debts and costs of administration unless such claimants have waived such deposit or consented to provisions in the plan otherwise dealing with their claims, and the money or other consideration which under the plan is to be distributed to other creditors at the time of confirmation.

(*b*) *Waiver.*—Any person who has waived his right to share in the distribution of the deposit or in payments under the plan shall file with the court, prior to confirmation of the plan, a statement setting forth the waiver and any agreement with respect thereto made with the debtor, his attorney, or any other person.

(*c*) *Objections to confirmation.*—Objections to confirmation of the plan shall be filed and served on the debtor, and the creditors' committee, if any, at any time prior to confirmation or by such earlier date as the court may

fix. An objection to confirmation on the ground that the debtor committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt is governed by Part VII of the Bankruptcy Rules. Any other objection is governed by Bankruptcy Rule 914.

(*d*) *Hearing on confirmation.*—The court shall rule on confirmation of the plan after hearing on notice as provided in Rule 11–24. The hearing may be held at any time after the conclusion of the first meeting of creditors. If no objection is timely filed under subdivision (c) of this rule, the court may find, without taking proof, that the debtor has not committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt and that the plan has been proposed and its acceptance procured in good faith, and not by any means, promises, or acts forbidden by law.

(*e*) *Order of confirmation.*—The order of confirmation shall conform substantially to Official Form No. 11–F18. Notice of entry of the order of confirmation and a copy of the provisions of the order dealing with the discharge of the debtor shall be mailed to the debtor and to all creditors within 30 days after entry of the order.

(*f*) *Evidence of title.*—A certified copy of the plan and of the order confirming the plan shall constitute conclusive evidence of the revesting of title to all property in the debtor or the vesting of title in such other person as may be provided in the plan or in the order confirming the plan.

Rule 11–39. Modification of plan before confirmation.

At any time prior to the acceptance of a plan by the requisite majority of creditors, the debtor may file a modification thereof. After a plan has been so accepted and before its confirmation the debtor may file a modification of the plan only with leave of court. The debtor may also submit with the proposed modification written acceptances thereof by creditors. If the court finds that

the proposed modification does not materially and adversely affect the interest of any creditor who has not in writing accepted it, the modification shall be deemed accepted by all creditors who have previously accepted the plan. Otherwise, the court shall enter an order that the plan as modified shall be deemed to have been accepted by any creditor who accepted the plan and who fails to file with the court within such reasonable time as shall be fixed in the order a written rejection of the modification. Notice of such order, accompanied by a copy of the proposed modification, shall be given to creditors and other parties in interest at least 10 days before the time fixed in such order for filing rejections of the modification. The debtor shall, if required by the court, furnish a sufficient number of copies of the proposed modification to enable the court to transmit a copy with each such notice.

Rule 11–40. Modification of plan after confirmation where court has retained jurisdiction.

At any time during the period of a confirmed plan providing for extension and before payment in full of deferred installments or delivery of negotiable promissory notes, if any, to the creditors, where the court has retained jurisdiction pursuant to the Act, the debtor may file an application with leave of court to modify the terms of the plan by changing the time of payment or reducing the amount of payment, or both. The application shall set forth the reason for the proposed modification, and shall be accompanied by a list of names and addresses of all creditors who have extended credit to the debtor since the plan was confirmed. If the court permits the application to be filed, it shall call a meeting of creditors including those who extended credit after confirmation of the plan, and other parties in interest, and a copy of the proposed modification shall accompany the notice of such meeting. The court, at such meeting, shall confirm the plan as modified if it is accepted in the

manner required for confirmation of the original plan by the creditors who are provided for in the plan and are affected by such modification.

Rule 11–41. Revocation of confirmation.

Any party in interest may, at any time within six months after a plan has been confirmed, make a motion pursuant to the Act to revoke the confirmation as procured by fraud. The circumstances constituting the alleged fraud shall be stated with particularity. When such motion is made, the court shall reopen the case if necessary and conduct a hearing on at least 10 days' notice to all parties in interest. If the confirmation is revoked—

(1) The court may dispose of the case pursuant to Rule 11–42 (b); or

(2) The court may receive proposals to modify the plan. Thereafter, the procedure for modification and for confirmation of a plan as modified shall follow Rules 11–38 and 11–39, except that acceptance of the plan shall not be required by any creditor who has participated in the fraud and such creditor shall not be counted in determining the number and amount of the claims of creditors whose acceptance is required. If a modified plan is not confirmed, the court shall dispose of the case pursuant to Rule 11–42 (b).

Rule 11–42. Dismissal or conversion to bankruptcy prior to or after confirmation of plan.

(*a*) *Voluntary dismissal or conversion to bankruptcy.*—The debtor may file an application or motion to dismiss the case or to convert it to bankruptcy at any time prior to confirmation or, where the court has retained jurisdiction, after confirmation. On the filing of such application or motion, the court shall—

(1) if the petition was filed pursuant to Rule 11–7, enter an order directing that the bankruptcy case proceed; or

(2) if the petition was filed pursuant to Rule 11–6, enter an order adjudicating the debtor a bankrupt if he so requests, or, if he requests dismissal, enter an order after hearing on notice dismissing the case or adjudicating him a bankrupt whichever may be in the best interest of the estate.

(*b*) *Dismissal or conversion to bankruptcy for want of prosecution, denial or revocation of confirmation, default, or termination of plan.*—The court shall enter an order, after hearing on such notice as it may direct dismissing the case, or adjudicating the debtor a bankrupt if he has not been previously so adjudged, or directing that the bankruptcy case proceed, whichever may be in the best interest of the estate—

(1) for want of prosecution; or

(2) for failure to comply with an order made under Rule 11–20 (d) for indemnification; or

(3) if confirmation of a plan is denied; or

(4) if confirmation is revoked for fraud and a modified plan is not confirmed pursuant to Rule 11–41; or

(5) where the court has retained jurisdiction after confirmation of a plan:

(A) if the debtor defaults in any of the terms of the plan; or

(B) if a plan terminates by reason of the happening of a condition specified therein.

The court may reopen the case, if necessary, for the purpose of entering an order under this subdivision.

(*c*) *Notice of dismissal.*—Promptly after entry of an order of dismissal under this rule, notice thereof shall be given as provided in Rule 11–24.

(*d*) *Effect of dismissal.*—Unless the order specifies to the contrary, dismissal of a case under this rule on the ground of fraud is with prejudice, and a dismissal on any other ground is without prejudice. A certified copy of the order of dismissal under this rule shall constitute

conclusive evidence of the revesting of the debtor's title to his property.

(*e*) *Consent to adjudication.*—Notwithstanding the foregoing, no adjudication shall be entered under this rule against a wage earner or farmer without his written consent.

Rule 11–43. Confirmation as discharge.

(*a*) *Statement of discharge.*—The order confirming a plan shall contain provisions substantially similar to Official Form No. 11–F18 stating the effect of confirmation on the further enforcement of claims against the debtor.

(*b*) *Registration in other districts.*—An order confirming a plan that has become final may be registered in any other district by filing in the office of the clerk of the district court of that district a certified copy of the order and when so registered shall have the same effect as an order of the court of the district where registered and may be enforced in like manner.

Rule 11–44. Petition as automatic stay of actions against debtor and lien enforcement.

(*a*) *Stay of actions and lien enforcement.*—A petition filed under Rule 11–6 or 11–7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

(*b*) *Duration of stay.*—Except as it may be deemed annulled under subdivision (c) of this rule or may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision (d), (e), or (f) of

this rule, the stay shall continue until the case is closed, dismissed, or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(*c*) *Annulment of stay.*—At the expiration of 30 days after the first date set for the first meeting of creditors, a stay provided by this rule other than a stay against lien enforcement shall be deemed annulled as against any creditor whose claim has not been listed in the schedules and who has not filed his claim by that time.

(*d*) *Relief from stay.*—Upon the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(*e*) *Ex parte relief from stay.*—Upon the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee, receiver, or debtor in possession and to

the debtor and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(*f*) *Availability of other relief.*—Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 11–45. Duties of debtor.

Bankruptcy Rule 402 applies in Chapter XI cases and, in addition to the duties specified therein, the debtor shall attend at the hearing on confirmation of a plan and, if called as a witness, testify with respect to issues raised.

Rule 11–46. Apprehension and removal of debtor to compel attendance for examination.

Bankruptcy Rule 206 applies in Chapter XI cases to a debtor and, if the debtor is a partnership, to the general partners and any other person in control of the partnership and, if the debtor is a corporation, to any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control.

Rule 11–47. Exemptions.

Bankruptcy Rule 403 (a) applies in Chapter XI cases.

Rule 11–48. Determination of dischargeability of a debt; judgment on nondischargeable debt; jury trial.

Bankruptcy Rule 409 applies in Chapter XI cases except that the court may but need not make an order fixing a time for filing a complaint under § 17c (2) of the

Act. If such an order is made, at least 30 days' notice of the time so fixed shall be given to all creditors in the manner provided in Rule 11–24. The court may for cause, on its own initiative or on application of any party in interest, extend the time so fixed under this rule. If such an order is not made, a complaint to determine the dischargeability of a debt under clause (2), (4), or (8) of § 17a of the Act may be filed at any time.

Rule 11–49. Duty of trustee, receiver, or debtor in possession to give notice of Chapter XI Case.

Bankruptcy Rule 602 applies in Chapter XI cases.

Rule 11–50. Burden of proof as to validity of post-petition transfer.

Bankruptcy Rule 603 applies in Chapter XI cases.

Rule 11–51. Accounting by prior custodian of property of the estate.

Bankruptcy Rule 604 applies in Chapter XI cases.

Rule 11–52. Money of the estate; deposit and disbursement.

Bankruptcy Rule 605 (b) and (c) apply in Chapter XI cases.

Rule 11–53. Rejection of executory contracts.

When a motion is made for the rejection of an executory contract, including an unexpired lease, other than as part of the plan, the court shall set a hearing on notice to the parties to the contract and to such other persons as the court may direct.

Rule 11–54. Appraisal and sale of property; compensation and eligibility of appraisers and auctioneers.

(*a*) *Appraiser: Appointment and duties.*—The court may appoint one or more competent and disinterested appraisers who shall prepare and file with the court an appraisal of the property of the debtor. The court may prescribe how such appraisal shall be made.

(*b*) *Sale of property.*—The court may, on such notice as it may direct and for cause shown, authorize the trustee, receiver, or debtor in possession to lease or sell any real or personal property of the debtor, on such terms and conditions as the court may approve.

(*c*) *Compensation and eligibility of auctioneers and appraisers.*—Bankruptcy Rule 606 (c) applies in Chapter XI cases to any appraiser or auctioneer appointed by the court.

Rule 11–55. Abandonment of property.

After hearing on such notice as the court may direct and on approval by the court the trustee, receiver, or debtor in possession may abandon any property.

Rule 11–56. Redemption of property from lien or sale.

Bankruptcy Rule 609 applies in Chapter XI cases.

Rule 11–57. Prosecution and defense of proceedings by trustee, receiver, or debtor in possession.

Bankruptcy Rule 610 applies in Chapter XI cases.

Rule 11–58. Preservation of voidable transfer.

Bankruptcy Rule 611 applies in Chapter XI cases.

Rule 11–59. Proceeding to avoid indemnifying lien or transfer to surety.

Bankruptcy Rule 612 applies in Chapter XI cases.

Rule 11–60. Courts of bankruptcy; officers and personnel; their duties.

Part V of the Bankruptcy Rules applies in Chapter XI cases.

Rule 11–61. Adversary proceedings.

(*a*) *Adversary proceedings.*—Part VII of the Bankruptcy Rules governs any proceeding instituted by a party before a bankruptcy judge in a Chapter XI case to (1) recover money or property other than a proceeding under Rule 11–32 or Rule 11–51, (2) determine the

validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) obtain an injunction, (5) obtain relief from a stay as provided in Rule 11–44, (6) object to confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

(*b*) *Reference in bankruptcy rules.*—As applied in Chapter XI cases, the reference in Rule 741 to "a complaint objecting to the bankrupt's discharge" shall be read to include also a reference to "a complaint objecting to the confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt."

Rule 11–62. Appeal to district court.

Part VIII of the Bankruptcy Rules applies in Chapter XI cases, except that:

(1) Rule 802 (c) thereof shall read as follows:

"(c) Extension of Time for Appeal. The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property or the issuance of any certificate of indebtedness, or is not a judgment or order under Rule 11–38 confirming a plan, or is not a judgment or order under Rule 11–42 dismissing a Chapter XI case, or converting a Chapter XI case to bankruptcy."

(2) The following shall be added to Rule 805 thereof:

"Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal."

Rule 11–63. General provisions.

Part IX of the Bankruptcy Rules applies in Chapter XI cases, except that:

(1) The definitions of words and phrases in §§ 306 and 307 of the Act govern their use in the Chapter XI Rules to the extent they are not inconsistent therewith.

(2) The references to various rules in Rule 906 (b) shall also include a reference to Chapter XI Rule 11–33 (b)(2).

(3) The references to various rules in Rule 906 (c) shall also include references to Chapter XI Rules 11–24 (a), 11–25 (a)(1), and 11–33 (b)(2).

(4) The exception in Rule 910 (c) for "the execution and filing of a proof of claim" shall be read to include also "the execution and filing of an acceptance of a plan" and the reference to Official Forms in that rule shall include a reference to Official Form No. 11–F16.

(5) The reference in Rule 913 (b) to "a dischargeable debt" shall be read as "a debt which is or will be provided for by the plan."

(6) The reference in Rule 919 (a) to Rule 203 (a) shall be read as a reference to Chapter XI Rule 11–24 (a).

(7) The reference in Rule 922 (b) to Rule 102 shall be read as a reference to Chapter XI Rule 11–5.

(8) The reference in Rule 924 to the time allowed by § 15 of the Act for the filing of a complaint to revoke a discharge shall be read to include also a reference to the time allowed by § 386 of the Act for the making of a motion to revoke the confirmation of a plan.

OFFICIAL CHAPTER XI FORMS

[NOTE. These official forms shall be observed and used, with such alterations as may be appropriate to suit the circumstances. See Bankruptcy Rule 909.]

FORM No. 11–F1

ORIGINAL PETITION UNDER CHAPTER XI

United States District Court
for the..... District of.....

In re
.....,
Debtor [include here all names used by debtor within last 6 years]
} Bankruptcy No.....

ORIGINAL PETITION UNDER CHAPTER XI

1. Petitioner's post-office address is.....
.....

2. Petitioner has resided [*or* has had his domicile *or* has had his principal place of business *or* if a partnership, or corporation, has had its principal assets] within this district for the preceding 6 months [*or* for a longer portion of the preceding 6 months than in any other district].

3. No other case under the Bankruptcy Act initiated on a petition by or against petitioner is now pending.

4. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter XI of the Act.

5. Petitioner is insolvent [*or* unable to pay his debts as they mature].

6. A copy of petitioner's proposed plan is attached [*or* petitioner intends to file a plan pursuant to Chapter XI of the Act].

7. [*If petitioner is a corporation*] Exhibit "A" is attached to and made part of this petition.

Wherefore petitioner prays for relief in accordance with Chapter XI of the Act.

Signed: .....,
Attorney for Petitioner.

Address: .....,
.....

[*Petitioner signs if not represented by attorney.*]

.....
Petitioner.

State of.....
County of..... } *ss.*

I, ..., the petitioner named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

.....,
Petitioner.

Subscribed and sworn to before me on.....

.....,
.....
[*Official character.*]

[*Unless the petition is accompanied by a list of all the debtor's creditors and their addresses, the petition must be accompanied by a schedule of his property, a statement of his affairs, and a statement of executory contracts, pursuant to Rule 11–11. These statements shall be submitted on official forms and verified under oath.*]

EXHIBIT "A"

[*If petitioner is a corporation, this Exhibit A shall be completed and attached to the petition pursuant to paragraph 7 thereof.*]

[*Caption, other than designation, as in Form No. 11–F1.*]

FOR COURT USE ONLY

.....
Date Petition Filed.

.....
Case Number.

.....
Bankruptcy Judge.

1. Petitioner's employer's identification number is.....

2. If any of the petitioner's securities are registered under section 12 of the Securities and Exchange Act of 1934, SEC file number is.....

3. The following financial data is the latest available information and refers to petitioner's condition on.....

a. Total assets: $.....

b. Liabilities:

		Approximate number of holders
Secured debt, excluding that listed below	$.....	.....
Debt securities held by more than 100 holders:	$.....	.....
Secured	$.....	.....
Unsecured	$.....	.....
Other liabilities, excluding contingent or unliquidated claims.....	$.....	.....
Number of shares of common stock.....	.....	.....

Comments, if any: .....
.....
.....

4. Brief description of petitioner's business: .....
.....
.....

5. The name of any person who directly or indirectly owns, controls, or holds, with power to vote, 25% or more of the voting securities of petitioner is.....

6. The names of all corporations 25% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held, with power to vote, by petitioner are.....
.....
.....

FORM NO. 11–F2

CHAPTER XI PETITION IN PENDING CASE

[*Caption, other than designation, as in Form No. 11–F1.*]

CHAPTER XI PETITION IN PENDING CASE

1. Petitioner's post-office address is.....
.....

2. Petitioner is the bankrupt or debtor in Bankruptcy Case No....., pending in this court.

3. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter XI of the Bankruptcy Act.

4. Petitioner is insolvent [*or* unable to pay his debts as they mature.]

5. A copy of petitioner's proposed plan is attached [*or* petitioner intends to file a plan pursuant to Chapter XI of the Act.]

6. [*If petitioner is a corporation*] Exhibit "A" is attached to and made part of this petition.

Wherefore, petitioner prays for relief in accordance with Chapter XI of the Act.

Signed: .....,
Attorney for Petitioner.

Address: .....,
.....,
[*Petitioner signs if not represented by attorney.*]

.....,
Petitioner.

State of.....
County of..... } *ss.*

I, ..., the petitioner named in the foregoing petition, do hereby swear that the statements contained

therein are true according to the best of my knowledge, information, and belief.

.....

Petitioner.

Subscribed and sworn to before me on .....

.....,

.....

[*Official character.*]

[*Unless the schedules and statements have already been filed in the bankruptcy case they must be filed with this petition or within 15 days thereafter as provided in Rule 11–11. These statements shall be on official forms and verified under oath.*]

EXHIBIT "A"

[*Exhibit "A" as in Form No. 11–F1.*]

FORM NO. 11–F3

VERIFICATION ON BEHALF OF A CORPORATION

[*Form No. 4 of the Bankruptcy Forms is applicable and should be used.*]

FORM NO. 11–F4

VERIFICATION ON BEHALF OF A PARTNERSHIP

[*Form No. 5 of the Bankruptcy Forms is applicable and should be used.*]

FORM NO. 11–F5

SCHEDULES

[*Form No. 6 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 6 should be changed to "debtor."*]

FORM NO. 11–F6

STATEMENT OF AFFAIRS FOR DEBTOR NOT ENGAGED IN BUSINESS

[*Form No. 7 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 7 should be changed to "debtor."*]

FORM NO. 11–F7

STATEMENT OF AFFAIRS FOR DEBTOR ENGAGED IN BUSINESS

[*Form No. 8 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 8 should be changed to "debtor."*]

FORM No. 11–F8

ORDER APPOINTING RECEIVER OR DISBURSING AGENT AND FIXING THE AMOUNT OF HIS BOND

[*Caption, other than designation, as in Form No. 11–F1.*]

ORDER APPOINTING RECEIVER [OR DISBURSING AGENT] AND FIXING THE AMOUNT OF HIS BOND

1. ....., of *..... ..... is hereby appointed receiver of the estate [*or* disbursing agent for the estate] of the above-named debtor.

2. The amount of the bond of the receiver [*or* disbursing agent] is fixed at $.....

Dated: .....

....., *Bankruptcy Judge.*

FORM No. 11–F9

NOTICE TO RECEIVER OR DISBURSING AGENT OF HIS APPOINTMENT

[*Caption, other than designation, as in Form No. 11–F1.*]

NOTICE TO RECEIVER [OR DISBURSING AGENT] OF HIS APPOINTMENT

To ....., of *..... .....

You are hereby notified of your appointment as receiver of the estate [*or* disbursing agent for the estate] of the above-named debtor. The amount of your bond has been fixed at $..... .....

[*The following paragraph is applicable to receiver only.*]

You are required to notify the undersigned forthwith of your acceptance or rejection of the office of receiver.

Dated: .....

....., *Bankruptcy Judge.*

FORM No. 11–F10

BOND OF RECEIVER OR DISBURSING AGENT

[*Caption, other than designation, as in Form No. 11–F1.*]

BOND OF RECEIVER [OR DISBURSING AGENT]

We, ..., of *....., as principal, and .....

**State post-office address.*

.....
of *....., as surety, bind ourselves to the United States in the sum of $..... for the faithful performance by the undersigned principal of his official duties as receiver of the estate [*or* disbursing agent for the estate] of the above-named debtor.

Dated: .....

.....,
.....

FORM NO. 11–F11

ORDER APPROVING RECEIVER'S OR DISBURSING AGENT'S BOND

[*Caption, other than designation, as in Form No. 11–F1.*]

ORDER APPROVING RECEIVER'S [OR DISBURSING AGENT'S] BOND

The bond filed by .....
of *..... as receiver of the estate [*or* disbursing agent for the estate] of the above-named debtor is hereby approved.

Dated: .....

.....,
Bankruptcy Judge.

FORM NO. 11–F12

CERTIFICATE OF RETENTION OF DEBTOR IN POSSESSION

[*Caption, other than designation, as in Form No. 11–F1.*]

CERTIFICATE OF RETENTION OF DEBTOR IN POSSESSION

I hereby certify that the above-named debtor continues in possession of his [its] estate as debtor in possession, no trustee in bankruptcy or receiver having been appointed or qualified.

Dated: .....

.....,
Bankruptcy Judge.

**State post-office address.*

FORM NO. 11–F13

ORDER FOR FIRST MEETING OF CREDITORS AND RELATED ORDERS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

[*Caption, other than designation, as in Form No. 11–F1.*]

ORDER FOR FIRST MEETING OF CREDITORS COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the debtor, his creditors, and other parties in interest:

.....

of *....., having filed a petition on ..... stating that he desires to effect a plan under Chapter XI of the Bankruptcy Act, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at ...., on ..... at ..... o'clock ... m.;

2. The debtor shall appear in person [*or, if the debtor is a partnership,* by a general partner, *or, if the debtor is a corporation,* by its president or other executive officer] before the court at that time and place for the purpose of being examined;

3. The hearing on confirmation of the plan shall be held at a date to be later fixed [*or* at a date to be fixed at the first meeting *or* at ..... on ..... at ..... or immediately following the conclusion of the first meeting].

4. Creditors may file written objections to confirmation at any time prior to confirmation [*or* ..... is fixed as the last day for the filing of objections to confirmation, *or* objections to confirmation may be filed by a date to be later fixed.]

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting the creditors may file their claims and acceptances of the plan, elect a standby trustee, elect a committee of creditors, examine the debtor as permitted by the court, and transact such other business as may properly come before the meeting.

The filing of the petition by the debtor above named operates as a stay of the commencement or continuation of any court or other

**State post-office address.*

proceeding against the debtor, of the enforcement of any judgment against him, of any act or the commencement or continuation of any court proceeding to enforce any lien on the property of the debtor, and of any court proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, as provided by Rule 11–44.

In order to have his claim allowed so that he may share in any distribution under a confirmed plan, a creditor must file a claim, whether or not he is included in the schedule of creditors filed by the debtor. Claims which are not filed before confirmation of the plan will not be allowed except as otherwise provided by law. A claim may be filed in the office of the undersigned bankruptcy judge on an official form prescribed for a proof of claim.

[*If appropriate*] .....
of *..... has been appointed receiver of the estate of the above-named debtor.

Dated: .....

....., *Bankruptcy Judge.*

FORM NO. 11–F14

PROOF OF CLAIM

[*Form No. 15 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 15 should be changed to "debtor."*]

FORM NO. 11–F15

PROOF OF CLAIM FOR WAGES, SALARY, OR COMMISSIONS

[*Form No. 16 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 16 should be changed to "debtor."*]

FORM NO. 11–F15A

PROOF OF MULTIPLE CLAIMS FOR WAGES, SALARY, OR COMMISSIONS

[*Form No. 16A of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 16A should be changed to "debtor."*]

**State post-office address.*

FORM No. 11–F16

POWER OF ATTORNEY

[*Caption, other than designation, as in Form No. 11–F1.*]

POWER OF ATTORNEY

To ..... of *....., and ..... of *.....:

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to receive distributions and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

Dated: .....

Signed: .....
By: .....
[*If appropriate*] as .....
Address: .....
.....

[*If executed by an individual*] Acknowledged before me on..... .....

[*If executed on behalf of a partnership*] Acknowledged before me on ....., by ....., who says that he is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*] Acknowledged before me on ....., by ....., who says that he is ..... of the corporation named above and is authorized to execute this power of attorney in its behalf.

.....,
.....
[*Official character*]

FORM No. 11–F17

ORDER FIXING TIME TO REJECT MODIFICATION OF PLAN PRIOR TO CONFIRMATION, COMBINED WITH NOTICE THEREOF

[*Caption, other than designation, as in Form No. 11–F1.*]

ORDER FIXING TIME TO REJECT MODIFICATION OF PLAN PRIOR TO CONFIRMATION, COMBINED WITH NOTICE THEREOF

To the debtor, his creditors and other parties in interest:

The debtor having filed a modification of his plan on .....

**State post-office address.*

....., it is ordered, and notice is hereby given, that:

1. ..... is fixed as the last day for filing a written rejection of the modification.

2. A copy [*or* a summary] of the modification is attached hereto. Any creditor who has accepted the plan and who fails to file a written rejection of the modification within the time above specified shall be deemed to have accepted the plan as modified.

Dated: .....

.....,
Bankruptcy Judge.

FORM No. 11–F18

ORDER CONFIRMING PLAN

[*Caption, other than designation, as in Form No. 11–F1*]

ORDER CONFIRMING PLAN

The debtor's plan filed on ....., [*if appropriate,* as modified by a modification filed on ....,.....,] having been transmitted to creditors; and

The deposit required by Chapter XI of the Bankruptcy Act having been made; and

It having been determined after hearing on notice:

1. That the plan has been accepted in writing by the creditors whose acceptance is required by law [*or* by all creditors affected thereby]; and

2. That the plan has been proposed and its acceptance procured in good faith, and not by any means, promises, or acts forbidden by law [*and, if the plan is accepted by less than all affected creditors,* the provisions of Chapter XI of the Act have been complied with, the plan is for the best interests of the creditors and is feasible, the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt];

It is ordered that:

A. The debtor's plan filed on ....., a copy of which is attached hereto, is confirmed.

B. Except as otherwise provided or permitted by the plan or this order:

(1) The above-named debtor is released from all dischargeable debts;

(2) Any judgment heretofore or hereafter obtained in any court

order than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under § 17a and b of the Act;

(b) [*if the court has fixed a time for the filing of complaints under § 17c (2) of the Act pursuant to Rule 11–48*] unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

(c) [*if the court has fixed a time for the filing of complaints under § 17c (2) of the Act pursuant to Rule 11–48*] unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clause (8) of § 17a of the Act, except those debts on which there was an action pending on ....., the date when the first petition was filed initiating a case under the Act, in which a right to jury trial existed and a party has either made a timely demand therefor or has submitted to this court a signed statement of intention to make such a demand;

(d) debts determined by this court to be discharged under § 17c (3) of the Act.

C. All creditors whose debts are discharged by this order and all creditors having claims of a type referred to in paragraph (B)(2) above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above-named debtor.

Dated: .....

....., *Bankruptcy Judge.*

FORM NO. 11–F19

NOTICE OF ORDER OF CONFIRMATION OF PLAN AND DISCHARGE

[*Caption, other than designation, as in Form No. 11–F1*]

NOTICE OF ORDER OF CONFIRMATION OF PLAN AND DISCHARGE

To the debtor, his creditors, and other parties in interest:

Notice is hereby given of the entry of an order of this court on ....., confirming the debtor's plan dated ....., and providing further that:

A. Except as otherwise provided or permitted by the plan or such order:

(1) The above-named debtor is released from all dischargeable debts;

(2) Any judgment theretofore or thereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under § 17a and b of the Bankruptcy Act;

(b) [*if the court has fixed a time for the filing of complaints under § 17c (2) of the Act pursuant to Rule 11–48*] unless theretofore or thereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

(c) [*if the court has fixed a time for the filing of complaints under § 17c (2) of the Act pursuant to Rule 11–48*] unless theretofore or thereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clause (8) of § 17a of the Act, except those debts on which there was an action pending on ....., the date when the first petition was filed initiating a case under the Act, in which a right to jury trial existed and a party has either made a timely demand therefore or has submitted to this court a signed statement of intention to make such a demand;

(d) debts determined by this court to be discharged under § 17c (3) of the Act.

B. All creditors whose debts are discharged by said order and all creditors having claims of a type referred to in paragraph (A)(2) above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above-named debtor.

Dated: .....

....., *Bankruptcy Judge.*

AMENDMENT TO OFFICIAL BANKRUPTCY FORMS

EFFECTIVE JULY 1, 1974

The following amendment to the Official Bankruptcy Forms was prescribed by the Supreme Court of the United States on March 18, 1974, pursuant to 28 U. S. C. § 2075, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 1004. The Judicial Conference report referred to in that letter is not reproduced herein.

This amendment became effective July 1, 1974, as provided in paragraph 1 of the Court's order, *ante*, p. 1006.

For earlier publication of Bankruptcy Rules and Forms, see, *e. g.*, 411 U. S. 989.

AMENDMENT TO OFFICIAL BANKRUPTCY FORM NO. 7 (14)

14. Losses.

a. Have you suffered any losses from fire, theft, or gambling during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including dates, names, and places, and the amounts of money or value and general description of property lost.)

b. Was the loss covered in whole or part by insurance? (If so, give particulars.)

15. Payments or transfers to attorneys.

a. Have you consulted an attorney during the year immediately preceding or since the filing of the original petition herein? (Give date, name, and address.)

b. Have you during the year immediately preceding or since the filing of the original petition herein paid any money or transferred any property to the attorney or to any other person on his behalf? (If so, give particulars, including amount paid or value of property transferred and date of payment or transfer.)

c. Have you, either during the year immediately preceding or since the filing of the original petition herein, agreed to pay any money or transfer any property to an attorney at law, or to any other person on his behalf? (If so, give particulars, including amount and terms of obligation.)

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

EFFECTIVE JULY 1, 1974

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on March 18, 1974, pursuant to 18 U. S. C. § 3771, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 1004. The Judicial Conference report referred to in that letter is not reproduced herein.

These amendments became effective July 1, 1974, as provided in paragraph 2 of the Court's order, *ante*, p. 1006.

For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, and 406 U. S. 979.

AMENDMENTS TO RULES 41 (a) AND 50 OF FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and seizure.

(*a*) *Authority to issue warrant.*—A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government.

Rule 50. Calendars; plan for prompt disposition.

(*a*) *Calendars.*—The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1057 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HUGHES ET AL. *v.* THOMPSON

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

No. A–719. Decided January 25, 1974

Motion for leave to file a petition for writ of mandamus and/or prohibition to require the District Court to rule on petitioners' motion to dismiss the indictment against them prior to the arraignment, is denied, since whether the latter motion should be disposed of prior to the arraignment rests in the District Court's sound discretion.

MR. JUSTICE DOUGLAS, Circuit Justice.

This motion for leave to file a petition for writ of mandamus and/or prohibition has been presented to me after a like motion was denied by the Court of Appeals on January 24, 1974. The matter concerns proceedings before the United States District Judge in Reno, Nevada, scheduled for a hearing at 9:30 a. m. P. d. t. today, January 25, 1974, which is only a little more than an hour from the time in which I write this short opinion.

The movants have been indicted for alleged manipulation of the stock of an airline company prior to its acquisition about five years ago—an acquisition which was approved by the Civil Aeronautics Board. Movants have filed with the District Court a motion to dismiss the indictment on the grounds that it does not state facts sufficient to constitute any offense against the United States and fails to inform movants of the nature of the cause of the accusation within the meaning

of the Sixth Amendment to the Constitution. Movants desire that their motion to dismiss be ruled upon prior to the arraignment. They asked the District Judge for a stay of all proceedings until the motion to dismiss the indictment was ruled upon. This stay was denied by the District Judge and, as noted, the Court of Appeals denied relief.

In cases such as the present one, where the factor of time is all important, it is customary (where possible) to consult other members of the Court before acting so that if there is a member of the Court available who feels that relief should be granted that fact can be taken into consideration. If, however, none of the Justices available feel relief should be granted then the prior consultation with those who are available is some aid to counsel seeking the relief.

Some Members of the Court are out of the city at the present time, as the Court is in recess. I have talked with five who are present and they are of the opinion that the motion to file should be denied. That is my view. Under the Federal Rules of Criminal Procedure the question of the sufficiency of the indictment "shall be noticed by the court at any time." Rule 12 (b)(2). Whether the motion should be disposed of prior to the arraignment rests in the sound discretion of the District Court.* The District Court certainly has the power to follow that course and sometimes it may be important to prevent harassment or the use of other unconstitutional procedures against an accused. But it would take an extremely unusual case for an appellate judge to direct a district judge that he should exercise his discretion by postponing

*Mandatory language directing when a motion shall be ruled upon is contained in Fed. Rule Crim. Proc. 12 (b)(4) which states that a motion raising defenses or objections "shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue."

an arraignment until after the motion to dismiss the indictment has been resolved. As stated in *Costello* v. *United States*, 350 U. S. 359, 364:

> "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

Motion denied.

HAYAKAWA ET AL. *v.* BROWN, SECRETARY OF STATE OF CALIFORNIA, ET AL.

ON APPLICATION FOR STAY AND RESTRAINING ORDER

No. A–839. Decided March 4, 1974

Application for stay of California Supreme Court's order denying mandamus to require state officials to accept applicant's nomination papers as candidate for the United States Senate, and for order restraining the officials from refusing to accept the papers, is denied, where the application does not disclose whether the state court's denial of mandamus rested on an independent state, rather than a federal, ground.

MR. JUSTICE DOUGLAS, Circuit Justice.

Hayakawa desires to run for the Senate from California on the Republican ticket. He has until March 8, 1974, to file. When the County Clerk and Secretary of State refused to accept his papers, he petitioned California's Supreme Court for a writ of mandamus. That court on a 4-to-3 vote denied it, no opinion being written. Hayakawa plans to apply for certiorari here from that denial and meanwhile wants me to stay the order of the California Supreme Court denying mandamus, pending the filing and disposition of a petition for certiorari here. His application also requests me to restrain the state officials from refusing to accept his nomination papers.

The barrier confronting the state officials is § 6401 of the California Election Code which prohibits a candidate from being a candidate of one party when he has within 12 months been registered with another party. Cases raising the constitutionality of provisions of that character are before the Court and not yet decided in No. 72–812, *Storer* v. *Brown*, and No. 72–6050, *Frommhagen* v. *Brown*. It would seem at first blush that the present

case, being of the same kind as *Storer* and *Frommhagen*, should be considered along with them.

The difficulty is that I have no way of knowing whether denial of the writ of mandamus rested on an independent state ground. That is an extraordinary writ, the issuance of which is traditionally discretionary. It may be that one acquainted with the labyrinth of California procedure would see the answer more clearly than I do. Yet the federal question—our only fulcrum in the case—has not yet surfaced in the litigation, as denial of mandamus, without more, may conceal a number of independent state grounds.

Application denied.

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ADMINISTRATIVE PROCEDURE—Continued.

directly "on" the reservation (plus those in Alaska and Oklahoma), this has not been validly accomplished. By not publishing its general assistance eligibility requirement in Federal Register or in Code of Federal Regulations, BIA has failed to comply with requirements of Act as to publication of substantive policies. Moreover, BIA has failed to comply with its own internal procedures, since the "on reservations" limitation is clearly an important substantive policy within class of directives—those that "inform the public of privileges and benefits available" and of "eligibility requirements"—that BIA Manual declares are among those to be published. Morton v. Ruiz, p. 199.

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2. *Clayton Act—Coal industry—Merger—"Failing company" defense—Inapplicability.*—United Electric's weak reserves position, rather than establishing a "failing company" defense by showing that company would have gone out of business but for merger, went to heart of Government's statistical prima facie case and substantiated District Court's conclusion that United Electric, even if it remained in market, did not have sufficient reserves to compete effectively for long-term contracts, and therefore appellees' failure to meet prerequisites of a failing-company defense did not detract from validity of District Court's analysis. United States v. General Dynamics Corp., p. 486.

3. *Clayton Act—Coal industry—Merger—Lessening of competition—Postacquisition evidence.*—District Court was justified in considering postacquisition evidence relating to changes in patterns and structure of coal industry and in United Electric's reserve situation, since (unlike evidence showing only that no lessening of competition has yet occurred) demonstration of weak coal resources necessarily implied that United Electric was not merely disinclined but unable to compete effectively for future contracts, such evidence going directly to question whether future lessening of competition was probable. United States v. General Dynamics Corp., p. 486.

4. *Clayton Act—Coal industry—Merger—No lessening of competition.*—While Government's statistical showing might have been sufficient to support a finding of "undue concentration" in absence of other considerations, District Court was justified in finding that other pertinent factors affecting coal industry and appellees' business mandated a conclusion that no substantial lessening of competition occurred or was threatened by acquisition. Ample evidence showed that United Electric does not have sufficient reserves, which are a key factor in measuring a coal producer's market strength, to make it a significant competitive force. Thus, in terms of probable future ability to compete, rather than in terms of past production on which Government relied, court was warranted in concluding that merger did not violate § 7 of Act. United States v. General Dynamics Corp., p. 486.

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2. *Employment discrimination—Election of remedies.*—The doctrine of election of remedies is inapplicable in present context, which involves statutory rights under Title VII distinctly separate from employee's contractual rights under a collective-bargaining agreement, regardless of fact that violation of both rights may have resulted from same factual occurrence. Alexander v. Gardner-Denver Co., p. 36.

3. *Employment discrimination—Federal courts—Arbitration—"Deferral rule" as against "preclusion rule."*—A policy of deferral by federal courts to arbitral decisions (as opposed to adoption of a preclusion rule) would not comport with congressional objective that federal courts should exercise final responsibility for enforcement of Title VII and would lead to: arbitrator's emphasis on law of the shop rather than law of the land; factfinding and other procedures less complete than those followed in a judicial forum; and perhaps employees bypassing arbitration in favor of litigation. Alexander v. Gardner-Denver Co., p. 36.

4. *Employment discrimination—Trial de novo—Effect of arbitration.*—An employee's statutory right to trial *de novo* under Title VII of Act is not foreclosed by prior submission of his claim to final arbitration under nondiscrimination clause of a collective-bargaining agreement. Alexander v. Gardner-Denver Co., p. 36.

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I. Case or Controversy.

Threatened prosecution—Handbilling.—An action for injunctive and declaratory relief by petitioner, who had been twice warned to stop handbilling at shopping center against American involvement in Vietnam and threatened with arrest for violation of Georgia criminal trespass law if he failed to do so, presents an "actual controversy" under Art. III of Constitution and Federal Declaratory Judgment Act. Alleged threats of prosecution in circumstances were not "imaginary or speculative," and it was unnecessary for petitioner to expose himself to actual arrest or prosecution to make his constitutional challenge. Whether controversy remains substantial and continuing in light of effect of recent reduction of Nation's involvement in Vietnam on petitioner's desire to engage in the handbilling at shopping center must be resolved by District Court on remand. Steffel v. Thompson, p. 452.

II. Due Process.

1. *Contempt conviction—Isolated use of street vernacular.*—Single isolated usage of street vernacular by petitioner in referring to his alleged assailant on cross-examination at his trial for violating ordinance, not directed at judge or any officer of court, cannot constitutionally support contempt conviction, since under circumstances it did not "constitute an imminent . . . threat to the administration of justice." Eaton v. City of Tulsa, p. 697.

2. *Contempt conviction—Use of expletive.*—Where trial court's judgment and sentence for criminal contempt disclosed that conviction rested on petitioner's use of expletive only in referring to his

CONSTITUTIONAL LAW—Continued.
alleged assailant on cross-examination at his trial for violating ordinance, Oklahoma Court of Criminal Appeals, in relying on petitioner's additional "discourteous responses" to trial judge, denied petitioner constitutional due process in sustaining trial court by treating conviction as one upon a charge not made. Eaton v. City of Tulsa, p. 697.

3. *Massachusetts flag-misuse statute—Vagueness.*—The challenged language of Massachusetts flag-misuse statute that subjects to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States . . . ," which had received no narrowing state court interpretation, is void for vagueness under Due Process Clause of Fourteenth Amendment, since by failing to draw reasonably clear lines between kinds of nonceremonial treatment of flag that are criminal and those that are not it does not provide adequate warning of forbidden conduct and sets forth a standard so indefinite that police, court, and jury are free to react to nothing more than their own preferences for treatment of flag. Smith v. Goguen, p. 566.

4. *Massachusetts flag-misuse statute—Vagueness.*—Even if, as appellant contends, Massachusetts flag-misuse statute could be said to deal only with "actual" flags of United States, this would not resolve central vagueness deficiency of failing to define contemptuous treatment. Smith v. Goguen, p. 566.

5. *Massachusetts flag-misuse statute—Vagueness.*—That other words of desecration and contempt portion of Massachusetts flag-misuse statute address more specific conduct (mutilation, trampling, and defacing of flag) does not assist appellant, since appellee was tried solely under "treats contemptuously" phrase, and highest state court in this case did not construe challenged phrase as taking color from more specific accompanying language. Smith v. Goguen, p. 566.

6. *Massachusetts flag-misuse statute—Vagueness.*—Regardless of whether restriction by highest state court of scope of challenged phrase of Massachusetts flag-misuse statute to intentional contempt may be held against appellee, such an interpretation nevertheless does not clarify what conduct constitutes contempt of flag, whether intentional or inadvertent. Smith v. Goguen, p. 566.

III. Eleventh Amendment.

1. *Aid to Aged, Blind, and Disabled benefits—Retroactive award.*—Court of Appeals erred in holding that *Ex parte Young*, 209 U. S. 123, which awarded only prospective relief, did not preclude retroactive monetary award of AABD benefits here on ground that it

CONSTITUTIONAL LAW—Continued.

was an "equitable restitution," since that award, though on its face directed against state official individually, as a practical matter could be satisfied only from general revenues of State and was indistinguishable from an award of damages against State. *Shapiro* v. *Thompson,* 394 U. S. 168; *State Dept. of Health and Rehabilitation Services* v. *Zarate,* 407 U. S. 918; *Sterrett* v. *Mothers' & Children's Rights Organization,* 409 U. S. 809; *Wyman* v. *Bowens,* 397 U. S. 49, disapproved to extent that their holdings do not comport with the holding in instant case on Eleventh Amendment issue. Edelman v. Jordan, p. 651.

2. *Aid to Aged, Blind, and Disabled benefits—Retroactive payments.*—The Eleventh Amendment bars that portion of District Court's decree that ordered retroactive payment of AABD benefits in action charging Illinois AABD officials with violating federal law and denying equal protection of laws by following state regulations which conflicted with federal regulations. Edelman v. Jordan, p. 651.

3. *Defense—Jurisdictional bar.*—The Court of Appeals properly considered Eleventh Amendment defense, which state officials did not assert in District Court, since that defense partakes of nature of a jurisdictional bar. Edelman v. Jordan, p. 651.

4. *Public funds—Nonliability.*—A suit by private parties seeking to impose a liability payable from public funds in the state treasury is foreclosed by the Eleventh Amendment if the State does not consent to suit. Edelman v. Jordan, p. 651.

5. *Suit challenging state Aid to Aged, Blind, and Disabled regulations—Waiver of immunity.*—Illinois did not waive its Eleventh Amendment immunity and consent to bringing of respondent's suit challenging validity of state AABD regulations by participating in federal AABD program. Nor does mere fact that a State participates in a program partially funded by Federal Government manifest consent by State to be sued in federal courts. Edelman v. Jordan, p. 651.

IV. Equal Protection of the Laws.

1. *Independent candidates—Access to ballot.*—The percentage provisions of Arts. 13.50 and 13.51 of Texas Election Code, under which an independent candidate, regardless of office sought, can qualify by filing within prescribed time a petition signed by a certain percentage of voters for governor at last preceding general election in specified locality, percentages varying with offices sought and in no event more than 500 signatures being required, are not

CONSTITUTIONAL LAW—Continued.

unduly burdensome. Requiring independent candidates to evidence a "significant modicum of support" is not unconstitutional, and record here is devoid of any proof to support claims of appellant independent candidates (who relied solely on minimal 500-vote-signature requirement) that these requirements were impermissibly onerous. American Party of Texas v. White, p. 767.

2. *Independent candidates—Ballot position—Nonaffiliation requirement.*—Section 6830 (d) of California Election Code (Supp. 1974), which forbids ballot position to independent candidate if he had registered affiliation with qualified political party within one year prior to immediately preceding primary election, is not unconstitutional, and appellants Storer and Frommhagen (who were affiliated with qualified party no more than six months before primary) were properly barred from ballot as result of its application. Storer v. Brown, p. 724.

3. *Indigent candidates—Access to ballot—Filing fees.*—Absent reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees that he cannot pay; denying a person right to file as a candidate solely because of an inability to pay a fixed fee, without providing any alternative means, is not reasonably necessary to accomplishment of State's legitimate interest of maintaining integrity of elections. Lubin v. Panish, p. 709.

4. *Medical care for indigents—Residence requirements—Right to travel.*—The one-year durational residence requirement for an indigent to receive free hospitalization or medical care, in violation of Equal Protection Clause, creates an "invidious classification" that impinges on right of interstate travel by denying newcomers "basic necessities of life." Memorial Hospital v. Maricopa County, p. 250.

5. *Minority political parties—Access to ballot.*—Article 13.45 (2) of Texas Election Code (Supp. 1973) (providing that precinct convention can nominate candidates if party is able, by notarized signatures, to evidence support by at least 1% of total gubernatorial vote at last preceding general election or, by a certain other process, can produce sufficient supplemental petitions with notarized signatures to make up a combined total of 1%), which does not freeze status quo but affords minority parties a real and essentially equal opportunity for ballot qualification, does not contravene First and Fourteenth Amendments and is in furtherance of a compelling state interest. American Party of Texas v. White, p. 767.

6. *Small political parties—Conventions—Access to ballot.*—The Equal Protection Clause does not forbid the requirement that small

CONSTITUTIONAL LAW—Continued.

parties proceed by convention rather than primary election. The convention process has not been shown here to be invidiously more burdensome than the primary election, followed by a runoff election where necessary. American Party of Texas v. White, p. 767.

7. *Small political parties—Financing primaries—Access to ballot.*—The McKool-Stroud Primary Law of 1972 (Texas), which provided for public financing from state revenues for primary elections of political parties casting 200,000 or more votes in last preceding general election for governor, is not unconstitutional, since it was designed to compensate for primary election expenses to which major parties alone are subject; and, as District Court correctly found, "the convention and petition procedure available for small and new parties carries with it none of the expensive election requirements burdening those parties required to conduct primaries." Moreover, the State is not obliged to finance efforts of every nascent political group seeking ballot placement, like appellant American Party, which failed to qualify for general election ballot. American Party of Texas v. White, p. 767.

8. *Veterans' Readjustment Benefits Act of 1966—Denial of benefits—Conscientious objectors performing civilian service.*—The challenged sections of Act making Class I–O conscientious objectors who performed required alternative civilian service ineligible for educational benefits under Act, do not create an arbitrary classification in violation of appellee's right to equal protection of the laws. The quantitative and qualitative distinctions between the disruption caused by military service and that caused by alternative civilian service—military service involving a six-year commitment and far greater loss of personal freedom, and alternative civilian service involving only a two-year obligation and no requirement to leave civilian life—form a rational basis for Congress' classification limiting educational benefits to military service veterans as a means of helping them to readjust to civilian life. The statutory classification also bears a rational relationship to the Act's objective of making military service more attractive. Johnson v. Robison, p. 361.

V. First Amendment.

1. *Associational rights—Minority political parties—Access to ballot.*—Article 13.45 (2) of Texas Election Code (Supp. 1973) (providing that precinct conventions can nominate candidates if party is able, by notarized signatures, to evidence support by at least 1% of total gubernatorial vote at last preceding general election or, by a certain other process, can produce sufficient supplemental petitions with notarized signatures to make up a combined total of

CONSTITUTIONAL LAW—Continued.

1%), which does not freeze status quo but affords minority parties a real and essentially equal opportunity for ballot qualification, does not contravene First and Fourteenth Amendments and is in furtherance of a compelling state interest. American Party of Texas v. White, p. 767.

2. *Freedom of religion—Veterans' Readjustment Benefits Act of 1966—Conscientious objectors performing civilian service.*—The Act does not violate right of free exercise of religion of appellee conscientious objector who performed required alternative civilian service. The withholding of educational benefits to appellee and his class involves only an incidental burden, if any burden at all, upon their free exercise of religion. Appellee and his class were not included as beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to include them would not rationally promote Act's purposes. The Government's substantial interest in raising and supporting armies, Art. I, § 8, is of "a kind and weight" clearly sufficient to sustain the challenged legislation. Johnson v. Robison, p. 361.

3. *Freedom of speech—New Orleans ordinance—"Opprobrious language" toward policeman—"Fighting words"—Overbreadth.*—New Orleans ordinance making it unlawful to use "opprobious language" toward police officer in performance of his duties, as construed by Louisiana Supreme Court, is susceptible of application to protected speech, and therefore is overbroad in violation of First and Fourteenth Amendments and facially invalid. Ordinance plainly has a broader sweep than constitutional definition of "fighting words" as being words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," since, at the least, "opprobrious language" embraces words that do not fall under that definition, the word "opprobrious" embracing words "conveying or intended to convey disgrace." It is immaterial whether words appellant used might be punishable under a properly limited ordinance. Lewis v. New Orleans, p. 130.

VI. Fourth Amendment.

1. *Warrantless search—Third party's consent.*—When prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that consent was given by defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to premises or effects sought to be inspected. United States v. Matlock, p. 164.

CONSTITUTIONAL LAW—Continued.

2. *Warrantless search and seizure—Jailed suspect.*—Warrantless search and seizure of respondent's clothing in morning after he had been arrested about 11 p. m. the previous night and taken to jail, did not violate Fourth Amendment. At time respondent was placed in his cell, normal processes incident to arrest and custody had not been completed, and delay in seizing clothing was not unreasonable, since at that late hour no substitute clothing was available, and when next morning police were able to supply substitute clothing and took respondent's clothing for laboratory analysis, they did no more than they were entitled to do incident to usual arrest and incarceration. United States v. Edwards, p. 800.

3. *Warrantless search and seizure—Place of detention.*—Once an accused has been lawfully arrested and is in custody, effects in his possession at place of detention that were subject to search at time and place of arrest may lawfully be searched and seized without a warrant even after a substantial time lapse between arrest and later administrative processing, on one hand, and taking of property for use as evidence, on other. United States v. Edwards, p. 800.

VII. Right to Travel.

Indigents—Medical care—Residence requirements—Compelling state interest.—The one-year durational residence requirement for an indigent to receive free hospitalization and medical care, since it operates to penalize indigents for exercising their constitutional right of interstate migration, must be justified by a compelling state interest. The State has not shown that such requirement is "legitimately defensible" in that it furthers a compelling state interest, and none of the purposes asserted as justification for the requirement—fiscal savings, inhibiting migration of indigents generally, deterring indigents from taking up residence in county solely to utilize medical facilities, protection of longtime residents who have contributed to community particularly by paying taxes, maintaining public support of county hospital, administrative convenience in determining bona fide residents, prevention of fraud, and budget predictability—satisfies State's burden of justification and insures that State, in pursuing its asserted objectives, has chosen means that do not unnecessarily impinge on constitutionally protected interests. Memorial Hospital v. Maricopa County, p. 250.

VIII. Seventh Amendment.

Jury trial—Action under Civil Rights Act of 1968.—The Seventh Amendment entitles either party to demand a jury trial in an action for damages in federal courts under § 812 of Civil Rights Act of

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1968, which authorizes private plaintiffs to bring civil actions to redress violations of Act's fair housing provisions. Curtis v. Loether, p. 189.

IX. Sixth Amendment.

Right of confrontation—Protective order—Cross-examination.—Petitioner, who was convicted of grand larceny and burglary, was denied his right of confrontation of witnesses under Sixth and Fourteenth Amendments by a protective order prohibiting questioning Green, a key prosecution witness, concerning Green's adjudication as a juvenile delinquent relating to burglary and his probation status at time of events as to which he was to testify. The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in burglary charged against petitioner, and limiting cross-examination of Green precluded defense from showing Green's possible bias. Petitioner's right of confrontation is paramount to State's policy of protecting juvenile offenders and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Davis v. Alaska, p. 308.

CONSTRUCTION OF STATUTES. See **Gun Control Act of 1968; Independent Offices Appropriation Act, 1952; Indians,** 2–3; **Omnibus Crime Control and Safe Streets Act of 1968,** 1; **Removal,** 1.

CONTEMPT. See **Constitutional Law,** II, 1–2; **Injunctions,** 5; **Removal,** 2.

CONTEMPT OF FLAG. See **Constitutional Law,** II, 3–6; **Habeas Corpus.**

CONTRACTUAL RIGHTS. See **Civil Rights Act of 1964,** 1–2, 4; **Evidence,** 1.

COPYRIGHT ACT OF 1909.

1. *Community antenna television systems—Broadcasters' copyrighted materials—Infringement.*—The development and implementation, since the decision in *Fortnightly Corp.* v. *United Artists Television,* 392 U. S. 390, of new functions of CATV systems—program origination, sale of commercials, and interconnection with other CATV systems—even though they may allow the systems to compete more effectively with broadcasters for the television market, do not convert the entire CATV operation, regardless of distance from the broadcasting station, into a "broadcast function," thus subjecting

COPYRIGHT ACT OF 1909—Continued.

CATV operators to copyright infringement liability, but are extraneous to a determination of such liability, since in none of these functions is there any nexus with the CATV operators' reception and rechanneling of the broadcasters' copyrighted materials. Teleprompter Corp. v. CBS, p. 394.

2. *Community antenna television systems—"Distant" signals—Infringement.*—The fact that there have been shifts in current business and commercial relationships in the communications industry as a result of the CATV systems' importation of "distant" signals, does not entail copyright infringement liability, since by extending the range of viewability of a broadcast program, the CATV systems do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor from advertisers on the basis of all viewers who watch the particular program. Teleprompter Corp. v. CBS, p. 394.

3. *Community antenna television systems—"Distant" signals—"Performance."*—The importation by CATV systems of "distant" signals from one community into another does not constitute a "performance" under the Act. Teleprompter Corp. v. CBS, p. 394.

4. *Community antenna television systems—"Distant" signals—"Selection" of signals—Release to public.*—Even in exercising its limited freedom to choose among various "distant" broadcasting stations, a CATV operator cannot be viewed as "selecting" broadcast signals, since when it chooses which broadcast signals to rechannel, its creative function is then extinguished and it thereafter "simply carr[ies], without editing, whatever programs [it] receive[s]." Nor does a CATV system importing "distant" signals procure and propagate them to the public, since it is not engaged in converting the sights and sounds of an event or a program into electronic signals available to the public, the signals it receives and rechannels having already been "released to the public" even though not normally available to the specific segment of the public served by the CATV system. Teleprompter Corp. v. CBS, p. 394.

5. *Community antenna television systems—"Distant" signals—Viewer function.*—By importing signals that could not normally be received with current technology in community it serves, a CATV system does not, for copyright purposes, alter function it performs for its subscribers, as reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of distance between broadcasting station and ultimate viewer. Teleprompter Corp. v. CBS, p. 394.

COPYRIGHTED TELEVISION PROGRAMS. See **Copyright Act of 1909**, 1–2.

COUNTY SUPERVISORS. See **Constitutional Law**, IV, 3.

COURT OF CLAIMS. See **Judicial Review**, 2.

CRIMINAL CONTEMPT. See **Constitutional Law**, II, 1–2; **Injunctions**, 5; **Removal**, 2.

CRIMINAL LAW. See **Constitutional Law**, I; II, 3; V, 3; VI; IX; **Declaratory Judgments**; **District Courts**; **Evidence**, 2, 6–7; **Federal-State Relations**, 2; **Gun Control Act of 1968**; **Habeas Corpus**; **Omnibus Crime Control and Safe Streets Act of 1968**; **Procedure**, 4.

CRIMINAL TRESPASS. See **Constitutional Law**, I; **Declaratory Judgments.**

CROSS-EXAMINATION. See **Constitutional Law**, II, 1–2; IX.

DAMAGES ACTIONS. See **Constitutional Law**, VIII.

DAMAGE TO REPUTATION. See **Injunctions**, 2; **Judicial Review**, 1.

DECLARATORY JUDGMENTS. See also **Federal-State Relations**, 1–2.

Case or controversy—Threatened prosecution—Handbilling.—An action for injunctive and declaratory relief by petitioner, who had been twice warned to stop handbilling at shopping center against American involvement in Vietnam and threatened with arrest for violation of Georgia criminal trespass law if he failed to do so, presents an "actual controversy" under Art. III of Constitution and Federal Declaratory Judgment Act. Alleged threats of prosecution in circumstances were not "imaginary or speculative" and it was unnecessary for petitioner to expose himself to actual arrest or prosecution to make his constitutional challenge. Whether controversy remains substantial and continuing in light of effect of recent reduction of Nation's involvement in Vietnam on petitioner's desire to engage in handbilling at shopping center must be resolved by District Court on remand. Steffel v. Thompson, p. 452.

DEEP-MINING COAL PRODUCERS. See **Antitrust Acts**, 1.

DEFENSE CONTRACTS. See **Judicial Review**, 2–4; **Jurisdiction**, 5.

DEFERRAL RULE. See **Civil Rights Act of 1964**, 3.

DE NOVO PROCEEDINGS. See **Civil Rights Act of 1964**, 4; **Evidence**, 1; **Judicial Review**, 2.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Constitutional Law**, III, 2, 5; **Jurisdiction**, 4.

DISCHARGE OF EMPLOYEES. See **Civil Rights Act of 1964**; **Evidence**, 1; **Injunctions**, 2–4; **Judicial Review**, 1.

DISCOVERY. See **Judicial Review**, 2; **Jurisdiction**, 5.

DISCRETION. See **District Courts.**

DISCRETIONARY APPOINTMENT POWERS. See **Procedure**, 3.

DISCRIMINATION. See **Appeals**, 2; **Civil Rights Act of 1964**; **Constitutional Law**, IV, 8; VIII; **Evidence**, 1; **Injunctions**, 1; **Procedure**, 1, 3.

DISMISSAL OF INDICTMENT. See **District Courts.**

DISMISSALS. See **Jurisdiction**, 2, 4.

DISSOLUTION OF RESTRAINING ORDERS. See **Injunctions**, 7; **Removal**, 2.

"DISTANT" SIGNALS. See **Copyright Act of 1909**, 2–5.

DISTRIBUTION OF EMPLOYEE LITERATURE. See **National Labor Relations Act.**

DISTRICT COURTS. See also **Judicial Review**, 1; **Jurisdiction**, 1–5.

Indictments—Pre-arraignment dismissal—Court's discretion.—Motion for leave to file petition for writ of mandamus or prohibition to require District Court to rule on petitioners' motion to dismiss indictment against them prior to arraignment, is denied, since whether latter motion should be disposed of prior to arraignment rests in District Court's sound discretion. Hughes v. Thompson (DOUGLAS, J., in chambers), p. 1301.

DOUBLE APPEAL BONDS. See **Procedure**, 2.

DRAFTEES. See **Constitutional Law**, IV, 8; V, 2.

DUE PROCESS. See **Constitutional Law**, II; **Habeas Corpus**; **Procedure**, 2.

DURATIONAL RESIDENCE REQUIREMENTS. See **Constitutional Law**, IV, 4; VII.

EDUCATIONAL BENEFITS. See **Constitutional Law**, IV, 8; V, 2; **Judicial Review**, 5–6.

ELECTION OF REMEDIES. See **Civil Rights Act of 1964**, 2.

ELECTIONS. See also **Constitutional Law,** IV, 1–3, 5–7; V, 1; **Procedure,** 6; **Stays.**

Absentee ballot—Minority parties—Erroneous exclusion.—District Court erred in sustaining exclusion of minority parties from absentee ballot. No justification was offered by appellees for not giving absentee ballot placement to appellant Socialist Workers Party, which satisfied statutory requirement for demonstrating necessary community support needed to win general ballot position for its candidates. American Party of Texas v. White, p. 767.

ELECTRIC UTILITIES. See **Independent Offices Appropriation Act, 1952,** 1, 4.

ELECTRONIC SURVEILLANCE. See **Omnibus Crime Control and Safe Streets Act of 1968.**

ELEVENTH AMENDMENT. See **Constitutional Law,** III.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Evidence,** 1; **Injunctions,** 2–4; **Judicial Review,** 1; **National Labor Relations Act; Removal,** 2.

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964; Evidence,** 1.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964· Evidence,** 1.

EQUAL PROTECTION OF THE LAWS. See **Appeals,** 2; **Constitutional Law,** IV; VII; **Injunctions,** 1; **Judicial Review,** 6; **Jurisdiction,** 1–4; **Procedure,** 1–3, 6.

EQUITABLE JURISDICTION. See **Judicial Review,** 4; **Jurisdiction,** 5.

EQUITABLE RELIEF. See **Injunctions,** 1–4; **Judicial Review,** 1, 4; **Procedure,** 5.

EQUITY. See **Injunctions,** 2–4; **Judicial Review,** 1, 3–4; **Jurisdiction,** 5.

EVIDENCE. See also **Antitrust Acts,** 1, 3–4; **Appeals; Civil Rights Act of 1964,** 3; **Constitutional Law,** VI, 2; **Omnibus Crime Control and Safe Streets Act of 1968; Procedure,** 3–4.

1. *Arbitral decision—Employment discrimination.*—In considering an employee's claim of employment discrimination under Title VII of Civil Rights Act 1964, the federal court may admit the arbitral decision involving same claim as evidence and accord it such weight

EVIDENCE—Continued.
as may be appropriate under the facts and circumstances of each case. Alexander v. Gardner-Denver Co., p. 36.

2. *False pretrial statements—Admissibility at trial.*—Where respondent's false statements as to lack of funds at his arraignment for improperly receiving gratuities for official acts and for perjury before grand jury, were admitted at his trial, use of pretrial testimony at trial to prove its incriminating content is not involved, since incriminating component of statements derives, not from their content, but from respondent's knowledge of their falsity, truth of matter being that he was not indigent and did not have right to appointment of counsel under Sixth Amendment. Nor is there involved what was "believed" by claimant to be a "valid" constitutional claim, and hence respondent was not faced with intolerable choice of having to surrender one constitutional right in order to assert another. United States v. Kahan, p. 239.

3. *Suppression hearings—Hearsay evidence—Admissibility.*—There is no automatic rule against receiving hearsay evidence in suppression hearings (where trial court itself can accord such evidence such weight as it deems desirable), and under circumstances here, where District Court was satisfied that Mrs. Graff's out-of-court statements had in fact been made and nothing in record raised doubts about their truthfulness, there was no apparent reason to exclude declarations in course of resolving issues raised at suppression hearings. United States v. Matlock, p. 164.

4. *Suppression hearings—Out-of-court statements—Admissibility.*—It was error to exclude from evidence at suppression hearings Mrs. Graff's out-of-court statements respecting joint occupancy with respondent of bedroom, which was subjected to warrantless search, as well as the evidence that both respondent and Mrs. Graff had represented themselves as husband and wife. United States v. Matlock, p. 164.

5. *Suppression hearings—Out-of-court statements—Admissibility—Sufficiency.*—Although, given admissibility of excluded out-of-court statements at suppression hearings, Government apparently sustained its burden of proof as to Mrs. Graff's authority to consent to warrantless search of respondent's bedroom, District Court should reconsider sufficiency of evidence in light of this Court's opinion. United States v. Matlock, p. 164.

6. *Suppression hearings—Statements against penal interest—Admissibility.*—Mrs. Graff's statements as to her joint occupancy of a

EVIDENCE—Continued.

bedroom with respondent were against her penal interest, since extramarital cohabitation is a state crime. Thus they carried their own indicia of reliability and should have been admitted as evidence at suppression hearings, even if they would not have been admissible at respondent's trial. United States v. Matlock, p. 164.

7. *Warrantless search—Proof of consent—Third party.*—When prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that consent was given by defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to premises or effects sought to be inspected. United States v. Matlock, p. 164.

EXCESSIVE PROFITS. See **Judicial Review**, 2; **Jurisdiction**, 5.

EXEMPTIONS. See **Constitutional Law, IV**, 8; **Judicial Review**, 5–6.

EXHAUSTION OF REMEDIES. See **Habeas Corpus.**

EX PARTE RESTRAINING ORDERS. See **Injunctions**, 5–7; **Removal.**

EXPIRATION OF RESTRAINING ORDERS. See **Injunctions**, 5–6; **Removal**, 2.

EXPLETIVES. See **Constitutional Law**, II, 1–2.

EXTRAJUDICIAL STATEMENTS. See **Evidence**, 3–5.

EXTRAMARITAL COHABITATION. See **Evidence**, 4, 6.

FACIAL UNCONSTITUTIONALITY. See **Constitutional Law**, V, 3.

"FAILING COMPANY" DEFENSE. See **Antitrust Acts**, 2.

FAIR HOUSING. See **Constitutional Law**, VIII.

FALSE STATEMENTS. See **Evidence**, 2.

FEDERAL AGENCIES. See **Independent Offices Appropriation Act, 1952.**

FEDERAL CAUSE OF ACTION. See **Jurisdiction**, 6.

FEDERAL COMMUNICATIONS COMMISSION. See **Independent Offices Appropriation Act, 1952**, 2–3.

FEDERAL DECLARATORY JUDGMENT ACT. See **Constitutional Law**, I; **Declaratory Judgments**; **Federal-State Relations**, 1–2.

FEDERAL POWER COMMISSION. See **Independent Offices Appropriation Act, 1952,** 1, 4; **Jurisdiction,** 6.

FEDERAL QUESTIONS. See **Jurisdiction,** 6; **Stays.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Appeals,** 1; **Injunctions,** 5–6; **Judicial Review,** 1; **Removal.**

FEDERAL RULES OF CRIMINAL PROCEDURE. See **District Courts.**

FEDERAL-STATE RELATIONS. See also **Constitutional Law,** I; III, 2, 5; **Declaratory Judgments; Habeas Corpus; Injunctions,** 5–7; **Jurisdiction,** 1–4, 6; **Procedure,** 1–3, 5; **Removal.**

1. *Federal declaratory relief—Threatened prosecution—Unconstitutional state statute.*—Federal declaratory relief is not precluded when a prosecution based upon an assertedly unconstitutional state statute has been threatened, but is not pending, even if a showing of bad-faith enforcement or other special circumstances has not been made. When no state criminal proceeding is pending at time federal complaint is filed, considerations of equity, comity, and federalism on which *Younger* v. *Harris,* 401 U. S. 37, and *Samuels* v. *Mackell,* 401 U. S. 66, were based, have little vitality: federal intervention does not result in duplicative legal proceedings or disruption of state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon state courts' ability to enforce constitutional principles. Even if Court of Appeals correctly viewed injunctive relief as inappropriate (a question not reached here, petitioner having abandoned his request for that remedy), court erred in treating requests for injunctive and declaratory relief as a single issue and in holding that a failure to demonstrate irreparable injury precluded granting of declaratory relief. Steffel v. Thompson, p. 452.

2. *Federal declaratory relief—Threatened prosecution—Unconstitutional state statute.*—In determining whether it is appropriate to grant declaratory relief when no state criminal proceeding is pending, it is immaterial whether the attack is made on the constitutionality of a state criminal statute on its face or as applied. Steffel v. Thompson, p. 452.

3. *Picketing of foreign ships—Labor Management Relations Act—Non-pre-emption of state-court jurisdiction.*—Respondents' picketing activities, which did not involve wages paid within this country but were designed to force foreign vessels to raise their operating costs to levels comparable to those of American shippers, would have materially affected foreign ships' "maritime operations" and precipitated responses by foreign shipowners in field of international rela-

FEDERAL-STATE RELATIONS—Continued.
tions transcending domestic wage-cost decision that LMRA was designed to regulate. Respondents' picketing was consequently not activity "affecting commerce" as defined in §§ 2 (6) and (7) of LMRA, and Texas courts erred in holding that they were prevented by LMRA from entertaining petitioners' injunction suit. Windward Shipping v. American Radio Assn., p. 104.

FEES OF JUSTICES OF THE PEACE. See **Procedure**, 2.

FEES ON CATV SYSTEMS. See **Independent Offices Appropriation Act, 1952**, 2–3.

FEES ON ELECTRIC UTILITIES OR NATURAL GAS COMPANIES. See **Independent Offices Appropriation Act, 1952**, 1, 4.

FIFTH AMENDMENT. See **Constitutional Law**, IV, 8; **Evidence**, 2, 4–6; **Judicial Review**, 6.

"FIGHTING WORDS." See **Constitutional Law**, V, 3.

FILING FEES. See **Constitutional Law**, IV, 3.

FIREARMS DEALERS. See **Gun Control Act of 1968.**

FIRST AMENDMENT. See **Constitutional Law**, IV, 8; V; **Judicial Review**, 6.

FLAG CONTEMPT OR MISUSE. See **Constitutional Law**, II, 3–6; **Habeas Corpus.**

FOREIGN COMMERCE. See **Federal-State Relations**, 3.

FOREIGN-FLAG SHIPS. See **Federal-State Relations**, 3.

FOURTEENTH AMENDMENT. See **Appeals**, 2; **Constitutional Law**, II, 3–6; IV, 1–3, 5–7; V, 1, 3; IX; **Habeas Corpus**; **Injunctions**, 1; **Jurisdiction**, 1–4; **Procedure**, 1, 3, 6.

FOURTH AMENDMENT. See **Constitutional Law**, VI; **Evidence**, 7.

FREEDOM OF ASSOCIATION. See **Constitutional Law**, IV, 5; V, 1.

FREEDOM OF INFORMATION ACT. See **Judicial Review**, 3–4; **Jurisdiction**, 5.

FREEDOM OF RELIGION. See **Constitutional Law**, V, 2; **Judicial Review**, 6.

FREEDOM OF SPEECH. See **Constitutional Law**, V, 3.

FREE HOSPITALIZATION OR MEDICAL CARE. See **Constitutional Law**, IV, 4; VII.

GAMBLING ACTIVITIES. See **Omnibus Crime Control and Safe Streets Act of 1968.**

GENERAL SERVICES ADMINISTRATION. See **Injunctions**, 2–4; **Judicial Review**, 1.

GEORGIA. See **Constitutional Law**, I; **Declaratory Judgments; Procedure**, 5.

GOVERNMENT CONTRACTS. See **Judicial Review**, 2–4; **Jurisdiction**, 5.

GOVERNMENT EMPLOYEES. See **Injunctions**, 2–4; **Judicial Review**, 1.

GRAND JURY. See **Evidence**, 2.

GRAND LARCENY. See **Constitutional Law**, IX.

GRATUITIES FOR OFFICIAL ACTS. See **Evidence**, 2.

GRIEVANCE-ARBITRATION CLAUSES. See **Civil Rights Act of 1964; Evidence**, 1.

GRIEVANCES OF EMPLOYEES. See **Civil Rights Act of 1964; Evidence**, 1.

GUN CONTROL ACT OF 1968.

Pawnshop firearms redemptions—18 U. S. C. § 922 (a)(6)—Applicability—"Acquisition."—Section 922 (a)(6), making it offense knowingly to make false statement "in connection with the acquisition . . . of any firearm . . . from a . . . licensed dealer" and "intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale or other disposition of such firearm . . . ," applies to redemption of a firearm from a pawnshop. Petitioner's contention that statute covers only a sale-like transaction is without merit, since "acquisition" as used in § 922 (a)(6) clearly includes any person, by definition, who "comes into possession, control, or power of disposal" of a firearm. Moreover, statutory terms "acquisition" and "sale or other disposition" are correlatives. Huddleston v. United States, p. 814.

HABEAS CORPUS. See also **Constitutional Law**, II, 3–6.

Due process claim—Challenge in state court—Preservation of claim—Federal habeas corpus jurisdiction.—By challenging in state courts vagueness of "treats contemptuously" phrase of Massachusetts flag-misuse statute as applied to him, appellee preserved his due

HABEAS CORPUS—Continued.

process claim for purposes of federal habeas corpus jurisdiction, since challenged language is void for vagueness as applied to appellee or to anyone else. A "hard-core" violator concept has little meaning with regard to challenged language, because phrase at issue is vague, not in the sense of requiring a person to conform his conduct to an imprecise but comprehensible standard, but in sense of not specifying any ascertainable standard of conduct at all. Smith v. Goguen, p. 566.

HANDBILLING. See **Constitutional Law,** I; **Declaratory Judgments.**

HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Constitutional Law,** III, 1–2, 5; **Jurisdiction,** 4.

HEARSAY EVIDENCE. See **Evidence,** 3–6.

HELIUM ACT AMENDMENTS OF 1960. See **Jurisdiction,** 6.

HELIUM CONSERVATION ACT. See **Jurisdiction,** 6.

HOSPITALS. See **Constitutional Law,** IV, 4; VII.

ILLINOIS. See **Constitutional Law,** III.

IMMINENT THREAT TO ADMINISTRATION OF JUSTICE. See **Constitutional Law,** II, 1–2.

IMMUNITY OF STATE FROM SUIT. See **Constitutional Law,** III.

INDEPENDENT CANDIDATES. See **Constitutional Law,** IV, 1–2, 5–7; V, 1; **Elections; Procedure,** 6.

INDEPENDENT OFFICES APPROPRIATION ACT, 1952.

1. *Fees—Application for agency's services—Receipt of specific services.*—While the Act includes services rendered "to or for any person (including groups . . .)," since the Act is to be construed to cover only "fees" and not "taxes," the "fee" presupposes an application for the agency's services, whether by a single company or group of companies or the receipt of a specific beneficial service. FPC v. New England Power Co., p. 345.

2. *Fees—Federal Communications Commission—Community antenna television systems.*—The Act authorizes imposition of a "fee," which connotes a "benefit" of "value to the recipient." The latter phrase is proper measure of authorized charge, not "public policy or interest served" phraseology which, *if read literally,* would enable agency to make assessments or tax levies whereby CATV's and other broadcasters would be paying not only for benefits they received

INDEPENDENT OFFICES APPROPRIATION ACT, 1952— Continued.

but, contrary to Act's objectives, would also be paying for protective services FCC renders to the public. National Cable Television Assn. v. United States, p. 336.

3. *Fees—Federal Communications Commission—Community antenna television systems.*—The FCC should reappraise annual fee imposed upon CATV's. It is not enough to figure total cost (direct and indirect) to FCC for operating a CATV supervision unit and then to contrive a formula reimbursing FCC for that amount, since some of such costs certainly inured to public's benefit and should not have been included in fee imposed upon CATV's. National Cable Television Assn. v. United States, p. 336.

4. *Reasonable charge—Identifiable recipient.*—The Act is to be construed as authorizing a reasonable charge to "each *identifiable recipient* for a measurable unit or amount of government service or property from which he derives a special benefit," and as precluding a charge for services rendered "when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public." FPC v. New England Power Co., p. 345.

INDEPENDENT STATE GROUNDS. See **Stays.**

INDIAN RESERVATIONS. See **Administrative Procedure; Indians.**

INDIANS. See also **Administrative Procedure.**

1. *Bureau of Indian Affairs assistance program—Indians living near reservation.*—Congress did not intend to exclude from BIA general assistance program these respondents and their class, who are full-blooded, unassimilated Indians living in an Indian community near their native reservation, and who maintain close economic and social ties with that reservation. Morton v. Ruiz, p. 199.

2. *Snyder Act—Appropriation hearings—Welfare service—Indians living near reservation.*—The legislative history of subcommittee hearings regarding appropriations under Snyder Act showing that Bureau of Indian Affairs' usual practice has been to represent to Congress that "on or near" reservations is equivalent of "on" for purposes of welfare service eligibility, and that successive budget requests were for Indians living "on or near" and not just for those living directly "on," clearly shows that Congress was led to believe that programs were being made available to those nonassimilated Indians living *near* reservation as well as to those living "on," and a fair reading of such history can lead only to conclusion that Indians

INDIANS—Continued.

situated near reservation, such as respondents, were covered by authorization. Morton v. Ruiz, p. 199.

3. *Welfare assistance—"On reservations" limitation—Bureau of Indian Affairs Manual.*—The fact that Congress made appropriations during time "on reservations" limitation for welfare assistance to Indians appeared in BIA Manual does not mean that Congress implicitly ratified BIA policy, where such limitation had not been published in Federal Register or in Code of Federal Regulations, and there is nothing in legislative history to show that limitation was brought to appropriation subcommittees' attention, let alone to entire Congress. But, even assuming that Congress knew of limitation when making appropriations, there is no reason to assume that it did not equate "on reservations" language with "on or near" category that continuously was described as service area. Morton v. Ruiz, p. 199.

INDICTMENTS. See **District Courts.**

INDIGENT CANDIDATES. See **Constitutional Law,** IV, 3.

INDIGENTS. See **Constitutional Law,** IV, 3–4; VII; **Evidence,** 2.

INFRINGEMENT SUITS. See **Copyright Act of 1909,** 1–2.

INJUNCTIONS. See also **Appeals,** 2; **Constitutional Law,** I; **Declaratory Judgments; Judicial Review,** 1, 4; **Jurisdiction,** 5; **Procedure,** 3, 5; **Removal.**

1. *Appointments to school board nominating panel—Racial discrimination—No relief against current mayor.*—Court of Appeals, in action charging Mayor with racial discrimination in appointing members of 1971 Nominating Panel for School Board, erred in ordering injunctive relief against Mayor with regard to 1973 Panel and future Panels since record speaks solely to appointment practices of his predecessor, who left office in 1972. Mayor v. Educational Equality League, p. 605.

2. *Discharged Government employee—Preliminary injunction—Irreparable injury.*—Viewing order at issue against respondent probationary employee's dismissal pending appeal to Civil Service Commission as a preliminary injunction, Court of Appeals erred in suggesting that at this stage of proceeding District Court need not have concluded that there was actually irreparable injury, and in intimating that, as alleged in respondent's unverified complaint, either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury. Sampson v. Murray, p. 61.

3. *Discharged Government employee—Temporary relief—Standards.*—While District Court is not totally without authority to grant

INJUNCTIONS—Continued.

interim injunctive relief to a discharged Government employee, nevertheless under standards that must govern issuance of such relief District Court's issuance of temporary injunctive relief here against respondent probationary employee's dismissal pending appeal to Civil Service Commission cannot be sustained. Sampson v. Murray, p. 61.

4. *Discharged Government employee—Temporary relief—Standards—Irreparable injury.*—Considering disruptive effect that grant of temporary relief here against respondent probationary employee's dismissal pending appeal to Civil Service Commission was likely to have on administrative process, and in view of historical denial of all equitable relief by federal courts in disputes involving discharge of Government employees; well-established rule that Government be granted widest latitude in handling its own internal affairs; and traditional unwillingness of equity courts to enforce personal service contracts, Court of Appeals erred in routinely applying traditional standards governing more orthodox "stays," and respondent at very least must show irreparable injury sufficient in kind and degree to override foregoing factors. Sampson v. Murray, p. 61.

5. *Restraining order—Expiration—Fed. Rule Civ. Proc. 65 (b).*—Where a court intends to supplant a temporary restraining order, which under Rule 65 (b) expires by its own terms within 10 days of issuance, with a preliminary injunction of unlimited duration pending a final decision on merits or further order of court, it should issue an order clearly saying so, and where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that order has expired within Rule 65 (b)'s time limits. Here, since only orders entered were a temporary restraining order and an order denying a motion to dissolve temporary order, Union had no reason to believe that a preliminary injunction of unlimited duration had been issued. Granny Goose Foods, Inc. v. Teamsters, p. 423.

6. *Restraining order—Expiration—State law—Fed. Rule Civ. Proc. 65 (b).*—Whether state law or Rule 65 (b) is controlling, the restraining order issued on May 18, 1970, expired long before the date of the alleged contempt on November 30, 1970, since under the State Code of Civil Procedure a temporary restraining order is returnable no later than 15 days from its date, 20 days if good cause is shown, and must be dissolved unless the party obtaining it proceeds to submit its case for a preliminary injunction, and similarly, under Rule 65 (b), such an order must expire by its own terms within 10 days after entry, 20 days if good cause is shown. Granny Goose Foods, Inc. v. Teamsters, p. 423.

INJUNCTIONS—Continued.

7. *State court preremoval restraining order—Motion to dissolve—Denial—Preliminary injunction.*—The District Court's denial of Union's motion to dissolve state court preremoval restraining order did not effectively convert order into a preliminary injunction of unlimited duration. That Union may have had opportunity to be heard on merits of preliminary injunction when it moved to dissolve restraining order is not controlling factor, since under Fed. Rule Civ. Proc. 65 (b) burden was on petitioner employers to show that they were entitled to preliminary injunction, not on Union to show that they were not. Granny Goose Foods, Inc. v. Teamsters, p. 423.

INTERCEPTED CONVERSATIONS. See **Omnibus Crime Control and Safe Streets Act of 1968.**

INTERIM INJUNCTIVE RELIEF. See **Injunctions,** 2–7; **Judicial Review,** 1.

INTERNATIONAL RELATIONS. See **Federal-State Relations,** 3.

INTERSTATE COMMERCE. See **Federal-State Relations,** 3.

INTERSTATE TRAVEL. See **Constitutional Law,** IV, 4; VII.

INTERVENING DECISIONS. See **Procedure,** 2, 5.

INVIDIOUS DISCRIMINATION. See **Constitutional Law,** IV, 4, 8.

IRREPARABLE INJURY. See **Constitutional Law,** I; **Declaratory Judgments; Federal-State Relations,** 1; **Injunctions,** 2, 4; **Judicial Review,** 1; **Procedure,** 5.

JAILS. See **Constitutional Law,** VI, 2–3.

JUDICIAL INTERFERENCE. See **Judicial Review,** 3–4; **Jurisdiction,** 5.

JUDICIAL REVIEW. See also **Constitutional Law,** IV, 8; **Injunctions,** 2–4; **Jurisdiction,** 5.

1. *Discharge of Government employee—District Court's review authority—Final administrative action.*—District Court's authority to review agency action does not come into play until it may be authoritatively said that administrative decision to discharge an employee does in fact fail to conform to applicable regulations, and until administrative action has become final, no court is in a position to say that such action did or did not conform to regulations. Here District Court authorized, on an interim basis, relief that the Civil Service Commission had neither considered nor authorized—the mandatory reinstatement of respondent in her Government position. Sampson v. Murray, p. 61.

JUDICIAL REVIEW—Continued.

2. *Renegotiation—Excessive profits—De novo proceeding—Court of Claims.*—The contractor, after Renegotiation Board's determination of excessive profits, through a *de novo* proceeding in the Court of Claims, where discovery procedures are available, is not limited in exercising its normal litigation rights. Renegotiation Board v. Bannercraft Co., p. 1.

3. *Renegotiation—Freedom of Information Act claim—Judicial interference.*—In a *renegotiation* case a contractor must pursue its administrative remedy under Renegotiation Act and cannot through resort to preliminary litigation over an FOIA claim obtain judicial interference with procedures set forth in Renegotiation Act. Renegotiation Board v. Bannercraft Co., p. 1.

4. *Renegotiation Act—Injunctive relief—Freedom of Information Act.*—It would contravene Renegotiation Act's legislative purpose if judicial review by way of injunctive relief under FOIA were allowed to interrupt process of bargaining that inheres in statutory renegotiation scheme and would delay Government's recovery of excessive profits. Renegotiation Board v. Bannercraft Co., p. 1.

5. *Veterans' benefits legislation—Constitutionality.*—Section 211 (a) of Title 38 U. S. C. does not bar judicial consideration of constitutional challenges to veterans' benefits legislation. Hernandez v. Veterans' Adminstration, p. 391.

6. *Veterans' benefits legislation—Constitutionality.*—Section 211 (a) of Title 38 U. S. C. does not extend to actions challenging the constitutionality of veterans' benefits legislation but is aimed at prohibiting review only of those decisions of law or fact arising in the *administration* of a *statute* providing for veterans' benefits, and hence is inapplicable to class action by Class I–O conscientious objector who performed required alternative civilian service, for declaratory judgment that provisions of Veterans' Readjustment Benefits Act of 1966 making him and his class ineligible for educational benefits under Act was unconstitutional on First and Fifth Amendment grounds, neither the text of § 211 (a) nor its legislative history showing a contrary intent. Johnson v. Robison, p. 361.

JURISDICTION. See also **Habeas Corpus; Judicial Review**, 3–5.

1. *District Court—Constitutional question—"Statutory" claim.*—Given a constitutional question over which District Court had jurisdiction, it also had jurisdiction over "statutory" claim. Latter claim was to be decided first and could be decided by single district judge, while constitutional claim could be adjudicated only by a three-judge court and only if statutory claim was previously rejected. Hagans v. Lavine, p. 528.

JURISDICTION—Continued.

2. *District court—Pendent claims—Supremacy Clause.*—State law claims pendent to federal constitutional claims conferring jurisdiction on a district court generally are not to be dismissed. Given advantages of economy and convenience and no unfairness to litigants, they are to be adjudicated, particularly where they may be dispositive and their decison would avoid adjudication of federal constitutional questions. There are special reasons to adjudicate pendent claim where, as here, claim, although called "statutory," is in reality a constitutional claim arising under Supremacy Clause, since "federal courts are particularly appropriate bodies for the application of pre-emption principles." Hagans v. Lavine, p. 528.

3. *District Court—28 U. S. C. § 1343 (3)—42 U. S. C. § 1983—Substantiality doctrine.*—Within accepted substantiality doctrine, petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on District Court to pass on controversy, since (1) complaint alleged a deprivation, under color of state law, of constitutional rights within meaning of §§ 1343 (3) and 1983; (2) equal protection issue was neither frivolous nor so insubstantial as to be beyond District Court's jurisdiction, and challenged regulation was not so clearly rational as to require no meaningful consideration; and (3) cause of action alleged was not so patently without merit as to justify a dismissal for want of jurisdiction, whatever may be ultimate resolution of federal issues on merits. Hagans v. Lavine, p. 528.

4. *District Court—28 U. S. C. § 1343 (3)—New York regulation—Equal protection—Conflict with federal laws—Pendent jurisdiction.*—District Court had jurisdiction under § 1343 (3) of action by recipients of public assistance under federal-state Aid to Families with Dependent Children (AFDC) program challenging New York regulation permitting State to recoup prior unscheduled payments for rent from subsequent grants under AFDC program, on ground that regulation violated Equal Protection Clause of Fourteenth Amendment and conflicted with Social Security Act and implementing regulations of Department of Health, Education, and Welfare. Section 1343 (3) conferred jurisdiction to entertain constitutional claim if it was of sufficient substance to support federal jurisdiction, in which case, District Court could hear as a matter of pendent jurisdiction claim of conflict between federal and state law, without determining that latter claim in its own right was encompassed within § 1343. Hagans v. Lavine, p. 528.

5. *Freedom of Information Act—Equitable jurisdiction.*—FOIA does not limit inherent powers of an equity court to grant relief, as

JURISDICTION—Continued.

is manifest from broad statutory language that Congress used, with its emphasis on disclosure, its carefully delineated exemptions, and fact that 5 U. S. C. § 552 (a) vests equitable jurisdiction in district courts. Renegotiation Board v. Bannercraft Co., p. 1.

6. *Suit for reasonable value of helium—Absence of federal jurisdiction.*—Respondent's suit for reasonable value of helium beyond what petitioner had already paid respondent for natural gas under sales contract, is in effect an action in *quantum meruit,* whose source is state not federal law. Under *Northern Natural Gas Co.* v. *Grounds,* 441 F. 2d 704, provisions in Helium Act Amendments of 1960 and Natural Gas Act do not create federal right of recovery but only preclude interposition of plea of payment to defeat quasi-contractual suit for helium constituent, which is insufficient to support federal jurisdiction under 28 U. S. C. § 1331 (a). Phillips Petroleum Co. v. Texaco Inc., p. 125.

JURY TRIALS. See **Constitutional Law,** VIII.

JUSTICES OF THE PEACE. See **Procedure,** 2.

JUSTICIABILITY. See **Constitutional Law,** I; **Declaratory Judgments.**

JUVENILE DELINQUENTS. See **Constitutional Law,** IX.

KNOWLEDGE OF FALSITY. See **Evidence,** 2.

LABOR See **Civil Rights Act of 1964; Evidence,** 1; **Federal-State Relations,** 3; **Injunctions,** 2–7; **National Labor Relations Act; Removal.**

LABOR DISPUTES. See **Federal-State Relations,** 3.

LABOR MANAGEMENT RELATIONS ACT. See **Federal-State Relations,** 3.

LABOR UNIONS. See **Injunctions,** 5–7; **National Labor Relations Act; Removal.**

LACK OF FUNDS FOR COUNSEL. See **Evidence,** 2.

LEGISLATIVE HISTORY. See **Indians,** 2–3.

LESSENING OF COMPETITION. See **Antitrust Acts,** 3–4.

LICENSED FIREARMS DEALERS. See **Gun Control Act of 1968.**

LONG-TERM CONTRACTS. See **Antitrust Acts,** 1–3.

LOSS OF EARNINGS. See **Injunctions,** 2; **Judicial Review,** 1.

LUNA BAR. See **Accretion.**

MANDAMUS. See **District Courts; Stays.**

MARITIME OPERATIONS. See **Federal-State Relations,** 3.

MASSACHUSETTS. See **Constitutional Law,** II, 3–6; **Habeas Corpus.**

McKOOL-STROUD PRIMARY LAW OF 1972. See **Constitutional Law,** IV, 7.

MEDICAL CARE. See **Constitutional Law,** IV, 4; VII.

MERCHANT SEAMEN. See **Federal-State Relations,** 3.

MERGERS. See **Antitrust Acts.**

MILITARY SERVICE. See **Constitutional Law,** IV, 8; V, 2; **Judicial Review,** 5–6.

MINORITY PARTIES. See **Constitutional Law,** IV, 5–7; V, 1; **Elections.**

MISSISSIPPI RIVER. See **Accretion.**

MISUSE OF FLAG. See **Constitutional Law,** II, 3–6; **Habeas Corpus.**

MOOTNESS. See **Procedure,** 2.

NATIONAL LABOR RELATIONS ACT. See also **Federal-State Relations,** 3.

Employees' distribution of literature—Prohibition—Interference with employees' rights.—Respondent's blanket rule against employees' distribution of literature on company property might interfere with employees' rights under § 7 of Act "to form, join, or assist labor organizations," or to refrain from such activities, and such rights, unlike those in economic area, cannot be waived by employees' collective-bargaining representative. The bulletin-board provision for union notices did not afford an adequate alternative, since it did not give union's adversaries equal access of communications with their fellow employees. NLRB v. Magnavox Co., p. 322.

NATIONAL LABOR RELATIONS BOARD. See **Federal-State Relations,** 3.

NATURAL GAS ACT. See **Jurisdiction,** 6.

NATURAL GAS COMPANIES. See **Independent Offices Appropriation Act, 1952,** 1, 4.

NEGROES. See **Appeals,** 2; **Civil Rights Act of 1964; Constitutional Law,** VIII; **Evidence,** 1; **Injunctions,** 1; **Procedure,** 1, 3.

NEW YORK. See **Jurisdiction,** 1–4.

NOMINATING PANELS. See **Appeals**, 2; **Injunctions**, 1; **Procedure**, 1, 3.

NOMINATING PETITIONS. See **Constitutional Law**, IV, 1, 5, 7; V, 1; **Elections**; **Procedure**, 6; **Stays.**

NOMINATIONS. See **Constitutional Law**, IV, 3, 5; V, 1; **Elections**; **Procedure**, 6.

NONDISCRIMINATION CLAUSES. See **Civil Rights Act of 1964**, 2; **Evidence**, 1.

NUISANCES. See **Procedure**, 5.

OBSCENITY. See **Procedure**, 5.

OFF-RESERVATION INDIAN ASSISTANCE. See **Administrative Procedure**; **Indians.**

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968. See also **Gun Control Act of 1968.**

1. *Wiretapping—Application or interception order—Naming of suspect—Persons "as yet unknown."*—Title III of Act requires naming of a person in application or interception order only when law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which wiretap is sought, and since it is undisputed, where Government sought wiretap of home telephones of respondent suspected bookmaker, Mr. Kahn, that Government had no reason to suspect respondent Mrs. Kahn of complicity in gambling business before wiretapping began, it follows that under statute she was among class of persons "as yet unknown" covered by wiretap order. United States v. Kahn, p. 143.

2. *Wiretapping—Conversations to which accused not party.*—Neither language of wiretap order nor that of Title III of Act requires suppression of legally intercepted conversations to which respondent Mr. Kahn was not himself a party. United States v. Kahn, p. 143.

ON-PREMISES DISTRIBUTION OF EMPLOYEE LITERATURE. See **National Labor Relations Act.**

ON-RESERVATIONS LIMITATION FOR INDIAN ASSISTANCE. See **Administrative Procedure**; **Indians.**

OPPROBRIOUS LANGUAGE TOWARD POLICE OFFICER. See **Constitutional Law**, V, 3.

"OTHERS AS YET UNKNOWN." See **Omnibus Crime Control and Safe Streets Act of 1968**, 1.

OUT-OF-COURT STATEMENTS. See **Evidence**, 3–5.

OVERBREADTH. See **Constitutional Law**, V, 3.

PAPAGO INDIANS. See **Administrative Procedure**; **Indians.**

PAWNSHOP FIREARMS REDEMPTIONS. See **Gun Control Act of 1968.**

PECUNIARY INTEREST IN CASE'S OUTCOME. See **Procedure**, 2.

PENAL INTEREST. See **Evidence**, 6.

PENDENT CLAIMS. See **Jurisdiction**, 1–2.

PENDENT JURISDICTION. See **Procedure**, 1, 3.

"PERFORMANCE." See **Copyright Act of 1909**, 3.

PERJURY. See **Evidence**, 2.

PERSONAL-SERVICE CONTRACTS. See **Injunctions**, 4; **Judicial Review**, 1.

PHILADELPHIA. See **Appeals**, 2; **Injunctions**, 1; **Procedure**, 1, 3.

PICKETING. See **Federal-State Relations**, 3.

PLACES OF DETENTION. See **Constitutional Law**, VI, 2–3.

PLEA BARGAINING. See **Procedure**, 4.

POLICE OFFICERS. See **Constitutional Law**, II, 3; V, 3.

POLITICAL CANDIDATES. See **Constitutional Law**, IV, 1–3; **Procedure**, 6.

POLITICAL PARTIES. See **Constitutional Law**, IV, 5–7; V, 1; **Elections**; **Procedure**, 6; **Stays.**

POSTACQUISITION EVIDENCE. See **Antitrust Acts**, 3.

PRECINCT NOMINATING CONVENTIONS. See **Constitutional Law**, IV, 6–7.

PRECLUSION RULE. See **Civil Rights Act of 1964**, 3.

PRE-EMPTION. See **Federal-State Relations**, 3; **Jurisdiction**, 2, 4.

PRELIMINARY INJUNCTIONS. See **Injunctions**, 2–5; **Judicial Review**, 1; **Removal**, 1.

PRETRIAL STATEMENTS. See **Evidence**, 2.

PRIMARY ELECTIONS. See **Constitutional Law**, IV, 3, 6–7; **Elections**; **Procedure**, 6.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Evidence**, 2.

PROBATIONARY GOVERNMENT EMPLOYEES. See **Injunctions**, 2–4; **Judicial Review**, 1.

PROCEDURE. See also **Appeals**; **Injunctions**, 1, 5–7; **Stays.**

1. *Appointments to school board nominating panel—Racial discrimination—Fourteenth Amendment—Remand—Pendent jurisdiction—Abstention.*—The principal issue throughout this litigation charging Mayor with racial discrimination in appointing members of Nominating Panel for School Board has been whether Mayor violated Fourteenth Amendment. There is no basis for remanding case to District Court for resolution of peripheral state law issues under that court's pendent jurisdiction or, alternatively, for abstention so that case may be tried anew in a state court. Mayor v. Educational Equality League, p. 605.

2. *Double appeal-bond statute—Constitutionality—Intervening decision—Vacation and remand.*—District Court's judgment upholding, against due process and equal protection challenges, a West Virginia statute requiring a double bond as a condition for appeal from justice of peace's judgment in civil case, is vacated and case is remanded to District Court so that that court, in first instance, may evaluate effect of intervening state court decision in another case upholding such statute but also holding that justice of peace judgment against defendant violated due process and was "void" on ground that because justice of peace's fee was enhanced when he ruled in plaintiff's favor, he had pecuniary interest in case's outcome. Patterson v. Warner, p. 303.

3. *Federal courts—Interference with executive appointments—Racial discrimination.*—Mayor's principal argument, in action charging that he had discriminated against Negroes in appointing members of Nominating Panel for School Board, that federal courts may not interfere with discretionary appointment powers of an elected executive officer, is of greater importance than was accorded it by Court of Appeals which found that Negroes had been unlawfully excluded from Panel, but argument need not be addressed here since record is devoid of reliable proof of racial discrimination. Mayor v. Educational Equality League, p. 605.

4. *Government witness—Time of plea bargain—Factual issue—Remand.*—Had there been a promise to Government witness, who had been indicted with petitioner, regarding disposition of witness' case before he testified at petitioner's trial that no promise had been made, reversal of petitioner's conviction would be required, and

PROCEDURE—Continued.

factual issue of whether plea bargain that was made with witness preceded or followed petitioner's trial should have been resolved by District Court after evidentiary hearing. DeMarco v. United States, p. 449.

5. *Intervening state decision—Effect on federal injunctive relief—Reconsideration.*—Since appellants may secure dismissal of state proceeding to enjoin operation of bookstore as violative of "public nuisance" statute by selling obscene materials, on basis of intervening decision in *Sanders* v. *State*, 231 Ga. 608, 203 S. E. 2d 153, which held statute unconstitutional as applied in similar case, thus precluding irreparable injury, without which federal injunctive relief would be barred, judgment below should be reconsidered in light of *Sanders* decision. Speight v. Slaton, p. 333.

6. *Remand—Additional findings—Independent candidates—Access to ballot.*—Further proceedings should be had in District Court to permit additional findings concerning extent of burden imposed on independent candidates for President and Vice President under California law, particularly with respect to whether Election Code § 6831 (1961) (requiring independent candidate's nominating papers to be signed by no less than 5% nor more than 6% of entire vote cast in preceding general election) and § 6833 (Supp. 1974) (requiring all such signatures to be obtained during 24-day period following primary and ending 60 days prior to general election), place unconstitutional restriction on access by appellants Hall and Tyner to ballot. Storer v. Brown, p. 724.

PRODUCTION OF DOCUMENTS. See **Judicial Review**, 2–4; **Jurisdiction**, 5.

PROHIBITION. See **District Courts.**

PROMISES TO GOVERNMENT WITNESS. See **Procedure**, 4.

PROSECUTION WITNESSES. See **Constitutional Law**, IX.

PROTECTION OF JUVENILE OFFENDERS. See **Constitutional Law**, IX.

PROTECTIVE ORDERS. See **Constitutional Law**, IX.

PUBLIC ASSISTANCE. See **Constitutional Law**, III, 1–2, 5; **Jurisdiction**, 4.

PUBLIC BUILDINGS SERVICE. See **Injunctions**, 2–4; **Judicial Review**, 1.

PUBLIC FINANCING OF POLITICAL PARTIES. See **Constitutional Law**, IV, 7.

PUBLIC NUISANCES. See **Procedure**, 5.

"PUBLIC POLICY OR INTEREST SERVED." See **Independent Offices Appropriation Act, 1952**, 2.

QUALITATIVE OR QUANTITATIVE DISTINCTIONS. See **Constitutional Law**, IV, 8.

QUANTUM MERUIT ACTIONS. See **Jurisdiction**, 6.

QUASI-CONTRACTUAL SUITS. See **Jurisdiction**, 6.

RACIAL DISCRIMINATION. See **Appeals**, 2; **Civil Rights Act of 1964**; **Constitutional Law**, VIII; **Evidence**, 1; **Injunctions**, 1; **Procedure**, 1, 3.

RADIO COMMUNICATIONS. See **Independent Offices Appropriation Act, 1952**, 2–3.

RATES. See **Jurisdiction**, 6.

RATIONAL BASES. See **Constitutional Law**, IV, 8; V, 2.

READJUSTMENT TO CIVILIAN LIFE. See **Constitutional Law**, IV, 8; V, 2.

REASONABLE VALUE. See **Jurisdiction**, 6.

RECOUPMENT REGULATIONS. See **Jurisdiction**, 4.

REDEMPTION OF FIREARMS FROM PAWNSHOP. See **Gun Control Act of 1968.**

REGULATIONS OF HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Constitutional Law**, III, 2, 5.

RELIGIOUS FREEDOM. See **Constitutional Law**, V, 2; **Judicial Review**, 6.

REMAND. See **Procedure**, 1–2, 4, 6.

REMOVAL. See also **Injunctions**, 7.

1. *State court injunction—Effect—Time limitations.*—Section 1450 of Title 28 U. S. C. was not intended to give state court injunctions greater effect after removal to federal court than they would have had if the case had remained in state court, and it should be construed in a manner consistent with the time limitations of Fed. Rule Civ. Proc. 65 (b). Granny Goose Foods, Inc. v. Teamsters, p. 423.

2. *State court restraining order—Expiration—Fed. Rule Civ. Proc. 65 (b).*—Once a case has been removed to federal court, federal law, including Federal Rules of Civil Procedure, controls future course of proceedings, notwithstanding state court orders issued prior to

REMOVAL—Continued.

removal. The underlying purpose of 28 U. S. C. § 1450 (to ensure that no lapse in state court temporary restraining order will occur simply by removing case to federal court) and policies reflected in time limitations of Rule 65 (b) (stringent restrictions on availability of *ex parte* restraining orders) can be accommodated by applying rule that such a state court preremoval order remains in force after removal no longer than it would have remained in effect under state law, but in no event longer than Rule 65 (b) time limitations, measured from date of removal. Accordingly, order issued May 18, 1970, expired by its terms on May 30, under the 10-day limitation of Rule 65 (b) applied from date of removal; hence no order was in effect on November 30, 1970, and Union violated no order when it resumed its strike at that time. Granny Goose Foods, Inc. v. Teamsters, p. 423.

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3. *"Perform."* §§ 1 (c) and (d), Copyright Act of 1909, 17 U. S. C. §§ 1 (c) and (d). Teleprompter Corp. v. CBS, p. 394.

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REPORTER NOTE FOLLOWING
PAGE 866, SHOULD READ
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